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# BOMBAY HIGH COURT

## 1919



### Chief Justices :

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" " Norman Macleod, Kt., B. A. (*Oxon.*), Bar-at-law.

### Puisne Judges :

The Hon'ble Sir John Heaton, Kt.

" Mr. Lallubhai Asharam Shah, Kt., M. A., LL. B.

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**Table No. I**—This Table shows serially the pages of INDIAN LAW REPORTS, for the year 1919 with corresponding references of the ALL INDIA REPORTER.

**Table No. II**—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1919 with corresponding references of the ALL INDIA REPORTER.

**Table No. III**—This Table is the converse of the **First** and **Second Tables.** It shows serially the pages of the ALL INDIA REPORTER for 1919 with corresponding references of all the JOURNALS.

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## TABLE No. I.

Showing seriatim the pages of INDIAN LAW REPORTS, BOMBAY SERIES for the year 1919, with corresponding references of the ALL INDIA REPORTER.

*N.B.*—Column No. 1 denotes pages of I. L. R. 43 BOMBAY.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

**I. L. R. 43 Bombay=All India Reporter.**

| ILR | A. I. R. | | | ILR | A. I. R. | | | ILR | A. I. R. | | | ILR | A. I. R. | | | ILR | A. I. R. | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | 1918 | *B* | 95 | 173 | 1918 | *B* | 93 | 376 | 1918 | *PC* | 135 | 550 | 1919 | *B* | 39 | 735 | 1919 | *B* | 130 |
| 6 | " | " | 107 | 181 | " | *PC* | 129 | 386 | 1919 | *B* | 67 | 554 | " | " | 150 | 739 | " | " | 164 |
| 17 | " | " | 101 | 201 | " | *B* | 82 | 412 | " | " | 61 | 559 | " | " | 44 | 769 | " | " | 126 |
| 28 | " | " | 79 | 209 | 1919 | " | 85 | 433 | " | " | 1 | 565 | " | " | 74 | 774 | " | " | 92 |
| 37 | " | " | 115 | 221 | " | " | 30 | 461 | " | " | 12 | 568 | " | " | 81 | 778 | 1918 | *PC* | 192 |
| 44 | " | " | 73 | 235 | " | " | 175 | 469 | " | " | 66 | 575 | " | " | 135 | 795 | 1919 | *B* | 145 |
| 63 | " | " | 72 | 240 | 1918 | " | 105 | 472 | " | " | 84 | 583 | " | " | 17 | 809 | " | " | 24 |
| 66 | " | " | 122 | 249 | " | " | 85 | 477 | 1918 | " | 1 | 607 | " | " | 158 | 836 | " | " | 28 |
| 69 | " | " | 84 | 258 | " | " | 123 | 481 | 1919 | " | 107 | 612 | 1918 | " | 13 | 838 | " | " | 172 |
| 77 | " | " | 96 | 277 | " | " | 99 | 487 | " | " | 78 | 631 | 1919 | " | 56 | 842 | " | " | 160 |
| 88 | " | *PC* | 206 | 281 | " | " | 88 | 492 | " | " | 1 | 641 | " | " | 80 | 845 | 1918 | " | 54 |
| 103 | " | *B* | 129 | 300 | 1919 | " | 103 | 507 | 1918 | *PC* | 188 | 647 | 1918 | " | 39 | 864 | 1919 | " | 93 |
| 122 | " | " | 91 | 310 | 1918 | " | 70 | 519 | 1919 | *B* | 119 | 689 | 1919 | " | 53 | 869 | " | " | 146 |
| 134 | " | " | 110 | 323 | 1919 | " | 88 | 531 | " | " | 97 | 703 | " | " | 34 | 885 | " | " | 140 |
| 147 | " | " | 117 | 334 | 1918 | " | 1 | 538 | " | " | 174 | 707 | " | " | 99 | 888 | " | " | 173 |
| 164 | " | " | 68 | 368 | 1919 | " | 133 | 542 | " | " | 101 | 716 | 1918 | " | 32 | 890 | " | " | 115 |
| 168 | " | " | 100 | | | | | | | | | | | | | | | | |

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## TABLE No. II

Showing seriatim the pages of other REPORTS, JOURNALS AND PERIODICALS for the year 1919 with corresponding references of the ALL INDIA REPORTER.

*N. B.*—Column No. 1 denotes pages of others JOURNALS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

**21 Bombay Law Reporter=All India Reporter**

| BLR | A. I. R. | | | BLR | A. I. R. | | | BLR | A. I. R. | | | BLR | A. I. R. | | | BLR | A. I. R. | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | 1919 | *B* | 78 | 157 | 1919 | *B* | 1 | 266 | 1919 | *B* | 174 | 361 | 1919 | *B* | 74 | 484 | 1919 | *PC* | 12 |
| 6 | " | " | 67 | 190 | 1918 | " | 20 | 270 | " | " | 150 | 363 | " | " | 81 | 489 | 1918 | " | 188 |
| 17 | " | " | 85 | 203 | 1919 | " | 141 | 274 | " | " | 79 | 369 | " | " | 135 | 496 | " | " | 192 |
| 27 | " | " | 30 | 203 | " | " | 12 | 276 | " | " | 161 | 376 | " | " | 122 | 506 | " | " | 85 |
| 41 | " | " | 119 | 213 | " | " | 84 | 277 | " | " | 158 | 384 | 1918 | " | 54 | 511 | " | " | 87 |
| 49 | " | " | 80 | 217 | " | " | 107 | 281 | 1918 | " | 59 | 397 | 1919 | " | 145 | 522 | " | " | 102 |
| 53 | 1918 | *PC* | 84 | 225 | " | " | 101 | 302 | 1919 | " | 154 | 406 | 1918 | " | 26 | 541 | " | " | 168 |
| 56 | " | *B* | 1 | 232 | 1918 | *PC* | 49 | 308 | " | " | 24 | 419 | 1919 | " | 131 | 544 | " | " | 217 |
| 85 | " | " | 39 | 238 | " | " | 97 | 329 | " | " | 61 | 427 | " | " | 127 | 547 | " | " | 169 |
| 114 | " | *PC* | 129 | 247 | 1919 | *B* | 59 | 344 | " | " | 75 | 435 | 1918 | " | 13 | 558 | " | " | 249 |
| 130 | " | " | 206 | 251 | " | " | 39 | 350 | " | " | 66 | 448 | 1919 | " | 164 | 569 | " | " | 112 |
| 137 | 1919 | *B* | 133 | 255 | " | " | 36 | 353 | " | " | 78 | 472 | " | *PC* | 6 | 580 | " | " | 121 |
| 148 | 1918 | " | 82 | 261 | " | " | 97 | 357 | " | " | 44 | 481 | " | " | 9 | | | | |

**21 Bombay Law Reporter=All India Reporter—(*Concld*)**

| BLR | A. I. R. | | | BLR | A. I. R. | | | BLR | A. I. R. | | | BLR | A. I. R. | | | BLR | A. I. R. | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 589 | 1918 | *PC* | 159 | 720 | 1919 | *B* | 34 | 788 | 1920 | *B* | 251 | 934 | 1920 | *B* | 285 | 1085 | 1920 | *B* | 101 |
| 597 | " | " | 203 | 724 | " | " | 162 | 808 | " | " | 363 | 948 | 1919 | " | 15 | 1090 | 1919 | " | 138 |
| 605 | " | " | 146 | 732 | " | " | 111 | | " | " | 400 | 952 | 1920 | " | 337 | 1096 | 1920 | " | 221 |
| 611 | " | " | 180 | 742 | " | " | 143 | 820 | 1919 | " | 45 | 955 | " | " | 309 | 1101 | " | " | 224 |
| 615 | " | " | 149 | 747 | " | " | 156 | 835 | " | " | 130 | 963 | " | " | 296 | 1103 | " | " | 211 |
| 622 | " | " | 148 | 753 | " | " | 96 | 837 | " | " | 146 | 972 | 1919 | " | 29 | 1111 | " | " | 230 |
| 627 | " | " | 182 | 755 | " | " | 93 | 849 | " | " | 115 | 975 | " | " | 152 | 1116 | " | " | 301 |
| 632 | " | " | 151 | 759 | " | " | 28 | 861 | 1920 | " | 331 | 980 | 1920 | " | 419 | 1126 | " | " | 334 |
| 640 | " | " | 196 | 761 | " | " | 172 | 867 | 1919 | *PC* | 31 | 986 | " | " | 192 | 1130 | " | " | 226 |
| 655 | 1919 | " | 1 | 763 | " | " | 160 | 885 | 1918 | " | 156 | 1014 | " | " | 156 | 1137 | " | " | 182 |
| 668 | " | *B* | 17 | 766 | " | " | 140 | 891 | 1919 | " | 11 | 1037 | " | " | 256 | 1148 | 1918 | *PC* | 185 |
| 687 | " | " | 53 | 768 | " | " | 173 | 895 | " | " | 17 | 1047 | 1919 | " | 40 | 1155 | 1920 | *B* | 239 |
| 698 | " | " | 56 | 770 | " | " | 99 | 906 | " | " | 162 | 1054 | 1920 | " | 217 | 1159 | " | " | 147 |
| 707 | " | " | 28 | 776 | " | " | 92 | 914 | " | " | 150 | 1059 | " | " | 315 | 1166 | " | " | 150 |
| 709 | " | " | 94 | 779 | " | " | 126 | 920 | " | " | 29 | 1065 | " | " | 322 | 1172 | " | " | 241 |
| 713 | " | " | 37 | 783 | " | " | 137 | 925 | " | " | 111 | 1084 | " | " | 85 | 1179 | " | " | 286 |
| 716 | " | " | 38 | 785 | 1920 | " | 294 | 930 | " | " | 126 | | | | | | | | |

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# TABLE No. III

Showing seriatim the pages of ALL INDIA REPORTER, 1919 BOMBAY, with corresponding references of other REPORTS, JOURNALS and PERIODICALS.

*N. B.*—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1919 BOMBAY.
Column No. 2 denotes corresponding references of other REPORTS and JOURNALS.

**A. I. R. 1919 Bombay=Other Journals**

| A. I. R. | Other Journals | | | A. I. R. | Other Journals | | | A. I. R. | Other Journals | | | A. I. R. | Other Journals | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | 50 | *I C* | 715 | 40 | 21 | *B L R* | 1047 | 81 | 51 | *I C* | 109 | 107 | 21 | *B L R* | 217 |
| | 43 | *Bom* | 443, 492 | 44 | 51 | *I C* | 72 | | 43 | *Bom* | 568 | 111 | 52 | *I C* | 481 |
| | 21 | *Bom L R* | 157 | | 43 | *Bom* | 559 | | 21 | *B L R* | 363 | | 21 | *B L R* | 732 |
| 12 | 52 | *I C* | 8 | | 21 | *B L R* | 357 | 84 | 50 | *I C* | 765 | | 20 | *Cr L J* | 657 |
| | 43 | *Bom* | 461 | 45 | 52 | *I C* | 770 | | 43 | *Bom* | 472 | 115 | 53 | *I C* | 197 |
| | 21 | *B L R* | 208 | | 21 | *B L R* | 820 | | 21 | *B L R* | 213 | | 43 | *Bom* | 890 |
| 15 | 53 | *I C* | 365 | 53 | 51 | *I C* | 924 | 85 | 49 | *I C* | 517 | | 21 | *B L R* | 849 |
| | 21 | *B L R* | 948 | | 43 | *Bom* | 689 | | 43 | *Bom* | 209 | 119 | 49 | *I C* | 882 |
| 17 | 51 | *I C* | 910 | | 21 | *B L R* | 687 | | 21 | *B L R* | 17 | | 43 | *Bom* | 519 |
| | 43 | *Bom* | 583 | 56 | 51 | *I C* | 929 | 88 | 51 | *I C* | 179 | | 21 | *B L R* | 41 |
| | 21 | *B L R* | 668 | | 43 | *Bom* | 631 | | 43 | *Bom* | 323 | 122 | 51 | *I C* | 228 |
| 24 | 50 | *I C* | 411 | | 21 | *B L R* | 698 | | 20 | *B L R* | 983 | | 21 | *B L R* | 376 |
| | 43 | *Bom* | 809 | 59 | 50 | *I C* | 995 | 92 | 52 | *I C* | 695 | 126 | 52 | *I C* | 516 |
| | 21 | *B L R* | 308 | | 21 | *B L R* | 247 | | 43 | *Bom* | 774 | | 43 | *Bom* | 769 |
| 28 (1) | 52 | *I C* | 288 | | 20 | *Cr L J* | 387 | | 21 | *B L R* | 776 | | 21 | *B L R* | 779 |
| | 43 | *Bom* | 836 | 61 | 51 | *I C* | 18 | 93 | 52 | *I C* | 670 | 127 | 51 | *I C* | 363 |
| | 21 | *B L R* | 759 | | 43 | *Bom* | 412 | | 43 | *Bom* | 864 | | 21 | *B L R* | 427 |
| | 20 | *Cr L J* | 624 | | 21 | *B L R* | 329 | | 21 | *B L R* | 755 | 130 | 53 | *I C* | 135 |
| 28 (2) | 51 | *I C* | 947 | 66 | 51 | *I C* | 7 | | 20 | *Cr L J* | 702 | | 43 | *Bom* | 735 |
| | 21 | *B L R* | 707 | | 43 | *Bom* | 469 | 94 | 49 | *I C* | 963 | | 21 | *B L R* | 835 |
| 29 | 53 | *I C* | 650 | | 21 | *B L R* | 350 | | 21 | *B L R* | 709 | 131 | 51 | *I C* | 353 |
| | 21 | *B L R* | 972 | 67 | 49 | *I C* | 396 | 96 | 52 | *I C* | 669 | | 21 | *B L R* | 419 |
| 30 | 49 | *I C* | 427 | | 43 | *Bom* | 386 | | 21 | *B L R* | 753 | 133 | 50 | *I C* | 427 |
| | 43 | *Bom* | 221 | | 21 | *B L R* | 6 | | 20 | *Cr L J* | 701 | | 43 | *Bom* | 368 |
| | 21 | *B L R* | 27 | 73 | 49 | *I C* | 388 | 97 | 51 | *I C* | 198 | | 21 | *B L R* | 137 |
| 34 | 52 | *I C* | 466 | | 21 | *B L R* | 1 | | 43 | *Bom* | 531 | 135 | 51 | *I C* | 223 |
| | 43 | *Bom* | 703 | 74 | 51 | *I C* | 101 | | 21 | *B L R* | 261 | | 43 | *Bom* | 575 |
| | 21 | *B L R* | 720 | | 43 | *Bom* | 565 | | 20 | *Cr L J* | 417 | | 21 | *B L R* | 369 |
| 36 | 51 | *I C* | 262 | | 21 | *B L R* | 361 | 99 | 52 | *I C* | 682 | 137 | 52 | *I C* | 519 |
| | 21 | *B L R* | 255 | 75 | 50 | *I C* | 972 | | 43 | *Bom* | 707 | | 21 | *B L R* | 783 |
| | 20 | *Cr L J* | 438 | | 21 | *B L R* | 344 | | 21 | *B L R* | 770 | 138 | 52 | *I C* | 593 |
| 37 | 51 | *I C* | 968 | 78 | 51 | *I C* | 79 | 101 | 50 | *I C* | 912 | | 21 | *B L R* | 1090 |
| | 21 | *B L R* | 713 | | 43 | *Bom* | 487 | | 43 | *Bom* | 542 | | 20 | *Cr L J* | 673 |
| 38 | 51 | *I C* | 954 | | 21 | *B L R* | 353 | | 21 | *B L R* | 225 | | | | |
| | 21 | *B L R* | 716 | 79 | 50 | *I C* | 491 | 103 | 51 | *I C* | 257 | 140 | 52 | *I C* | 607 |
| 39 | 50 | *I C* | 999 | | 21 | *B L R* | 274 | | 43 | *Bom* | 300 | | 43 | *Bom* | 885 |
| | 43 | *Bom* | 550 | | 20 | *Cr L J* | 315 | | 20 | *B L R* | 998 | | 21 | *B L R* | 766 |
| | 21 | *B L R* | 251 | 80 | 49 | *I C* | 637 | | 20 | *Cr L J* | 433 | | 20 | *Cr L J* | 687 |
| | 20 | *Cr L J* | 391 | | 21 | *B D R* | 49 | 107 | 50 | *I C* | 736 | 141 | 50 | *I C* | 449 |
| 40 | 53 | *I C* | 805 | | 43 | *Bom* | 641 | | 43 | *Bom* | 481 | | 21 | *B L R* | 203 |

**A. I. R. 1919 Bombay=Other Journals—(*Concld.*)**

| A.I.R. | Other Journals | | | A.I.R. | Other Journals | | | A.I.R. | Other Journals | | | A.I.R. | Other Journals | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 143 | 52 | *I C* | 489 | 152 | 21 | *B L R* | 975 | 160 | 20 | *Cr L J* | 681 | 172 | 21 | *B L R* | 761 |
| | 21 | *B L R* | 742 | 154 | 50 | *I C* | 403 | 161 | 50 | *I C* | 496 | | 20 | *Cr L J* | 697 |
| | 20 | *Cr L J* | 665 | | 21 | *B L R* | 302 | | 21 | *B L R* | 276 | 173 | 52 | *I C* | 667 |
| 145 | 51 | *I C* | 293 | 156 | 52 | *I C* | 597 | | 20 | *Cr L J* | 320 | | 43 | *Bom* | 888 |
| | 43 | *Bom* | 795 | | 21 | *B L R* | 747 | 162 | 52 | *I C* | 601 | | 21 | *B L R* | 768 |
| | 21 | *B L R* | 397 | | 20 | *Cr L J* | 677 | | 21 | *B L R* | 724 | | 20 | *Cr L J* | 699 |
| 146 | 53 | *I C* | 164 | 158 | 50 | *I C* | 492 | | 20 | *Cr L J* | 681 | 174 | 50 | *I C* | 1007 |
| | 43 | *Bom* | 869 | | 43 | *Bom* | 607 | 164 | 51 | *I C* | 657 | | 43 | *Bom* | 538 |
| | 21 | *B L R* | 837 | | 21 | *B L R* | 277 | | 43 | *Bom* | 739 | | 21 | *B L R* | 266 |
| 150 | 51 | *I C* | 783 | | 20 | *Cr L J* | 316 | | 21 | *B L R* | 448 | | 20 | *Cr L J* | 399 |
| | 43 | *Bom* | 554 | 160 | 52 | *I C* | 604 | | 20 | *Cr L J* | 497 | 175 | 48 | *I C* | 130 |
| | 21 | *B L R* | 270 | | 43 | *Bom* | 842 | 172 | 52 | *I C* | 665 | | 43 | *Bom* | 235 |
| | 20 | *Cr L J* | 543 | | 21 | *B L R* | 763 | | 43 | *Bom* | 838 | | 20 | *B L R* | 925 |
| 152 | 53 | *I C* | 599 | | | | | | | | | | | | |

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THE
# ALL INDIA REPORTER
# 1919
BOMBAY HIGH COURT

## ✲ ✲A. I. R. 1919 Bombay 1
## Full Bench

SCOTT, C. J., HEATON, MACLEOD, SHAH AND HAYWARD, JJ.

*Bhuta Jayatsingh*—Appellant.

v.

*Lakadu Dhansing*—Respondent.

Second Appeal No. 22 of 1917, Decided on 23rd September 1918, from decision of Asst. Judge. Khandesh, in Appeal No. 356 of 1915.

**✲ ✲(a) Civil P. C. (1908), S. 98—Second appeal from mofussil on appellate side of High Court—Judges differing—Procedure is governed by S. 98 and not by Letters Patent (Bom), Cl. 36.**

Per *Full Bench*—In second appeals from the mofussil on the appellate side of the High Court of Bombay where the Judges differ, the procedure is governed by S. 98, Civil P. C. and not by Cl. 36, Letters Patent of the Court. [P 4 C 2]

**✲ ✲ (b) Civil P. C. (1908), S. 144—(*Per Heaton* and *Shah, JJ.*)— Possession obtained under decree of trial Court—Decree reversed but restored in second appeal—Decree-holder can claim advantage of S. 144** (*Beaman, J. dissenting*)

Per *Heaton* and *Shah, JJ.*—A plaintiff, who has obtained a decree in his favour in the trial Court and gone into possession under it and has been put out of possession under the decree of the first Court of appeal reversing the trial Court's decree, and who has succeeded in the Court of second appeal which has restored the judgment of the trial Court, can claim the benefit of S. 144, Civil P. C. in respect of the time during which he was dispossessed between the decrees of the first and second appeal Courts. (*Beaman, J. dissenting.*) [P 10 C 2]

*W. B. Pradhan*—for Appellant.

*S. Y. Abhyankar*—for Respondents.

### Order of reference.

**Beaman, J.**—(12*th March* 1918).—The plaintiff has applied for restitution by way of compensation in the following circumstances: He brought a suit to be given joint enjoyment of the water of a well. The trial Court found in his favour. The defendants appealed, but while the appeal was pending the plaintiff took out execution of the decree, and was put in joint possession of the water of the well with the defendants. The Court of appeal reversed the decree of the Court below and dismissed the plaintiff's suit He appealed to the High Court, but the defendants in turn took out execution and the plaintiff was deprived of joint enjoyment of the water of the well. Two years later the High Court confirmed the decree of the trial Court. The plaintiff asks for restitution by way of compensation for the loss of joint enjoyment of the water for those two years. It is not very easy to find any good reason in the language of the section for refusing his prayer as the Courts below have done. The most I think, that can be said there is that the former section, of which S. 144 of the present Code is an enlargement, found a place in the chapter on first appeals, which lends some support to the principle which I would affirm. But I own that on that ground alone I should not feel very confident.

It appears to me however that such a prayer as this is opposed to the principle of restitution. As I understand that principle, it is limited to cases in which the status quo ante suit has been disturbed by a decree which is afterwards reversed. The case before us has to deal with two appellate decrees. The original decree disturbed the status quo ante, and the decree of the first Court of appeal restored it. There can be no doubt but

that, had the litigation ended here, the defendants would have been entitled to restitution for the intervening period by way of compensation had it been in all respects a proper case. That is to say, they would have been entitled to a restoration of the status quo ante the trial Court's decree, under which the plaintiff had disturbed that state of affairs, and along with it compensation for any loss which had been caused them by the premature execution of a wrong decree. In the end what was at that time a wrong decree was shown to be a right decree, and had the defendants not executed the intermediate decree no case would have arisen for compensation by way of restitution. Remembering that at the commencement of the period for which the plaintiff is asking for compensation the parties were relatively occupying the same positions as they had done before the litigation began, can it be said that the plaintiff is entitled to have what he asks? In my opinion it cannot. For if he can, it could only be upon a principle, which being extended to all cases would give a plaintiff who had been defeated in two Courts, but had finally succeeded in the High Court a right of this kind over all the intervening period. No such right has ever yet been claimed, nor if claimed would, I am sure, have been entertained in any Court. Here, for example, had the decree of the trial Court been against the plaintiff, and that decree had been confirmed by the Court of first appeal, the plaintiff would never have obtained joint enjoyment of the water of the well from the institution of the suit to its final decision in his favour some years later by the High Court. And most assuredly in that case he would have had nothing upon which to found a claim of this kind. I cannot see that the principle is really affected in any way by the fact that the plaintiff was successful in the trial Court, and lost no time in taking advantage of that Court's decree. If the principle upon which I would decide this appeal be correct it has this great advantage, that it is simple, uniform, and yields this result that in no case can a plaintiff ask for restitution or any of its concomitant modes, under S. 144. I am fortified, too, in my belief that this is the true principle by the fact that the pleader for the appellant could not refer us to a single case among the many which have come up for judicial determination under S. 144 and the corresponding section in the former Code, in which a plaintiff had asked for this relief.

In my view there can never be a true ground for affording relief to a plaintiff on the principle of restitution, for the very simple reason that until he is in under a good decree, he must be taken to have been out all the time, else he had not been a plaintiff. And when I say a good decree, I mean a decree which is finally good and beyond the reach of further correction. There might be a difficult case where in facts such as those with which we are dealing, the defendant had asked for and obtained restitution in the form of compensation under the intermediate decree. It might then be a question whether when the final decree re-affirmed the first decree, the plaintiff would not at least be entitled to be re-imbursed anything he had been compelled to pay to the defendant under the head of restitution. That however would be a genuine, though I think a very rare, case of restitution, and we may wait till it occurs before we express any definite opinion upon it. I would dismiss this appeal and confirm the order appealed against with all costs upon the appellant.

**Heaton, J.**—A litigant obtained a decree entitling him to the use jointly with another person of a well. I will call him the decree-holder and the other the judgment-debtor. The former applied to the trial Court to execute the decree and was placed in joint possession of the well with the judgment-debtor. Thereafter as the decree was reversed in first appeal, he was, on the application of the judgment-debtor, removed from joint possession on 8th November 1911. In second appeal the decree-holder again succeeded and was restored to joint possession on 7th November 1913. He now claims compensation for the period of two years from 8th November 1911 to 7th November 1913 for the loss he has been put to through being deprived of the use of the well water. The claim is made under S. 144, Civil P. C. Its merits have not been investigated, for both the lower Courts have decided that this application is not one that can be dealt with under S. 144. He has appealed and in my opinion his appeal must succeed.

The lower Courts have held that as the judgment-debtor did not gain anything material he cannot be called on to recompense the decree-holder for any loss. That, I think involves an absolute misreading of S. 144. The loss incurred by the decree-holder, if any, is due to the fact that the judgment-debtor executed against him an erroneous decree. If he has suffered a loss and if he is entitled to compensation that compensation must be obtained from the judgment-debtor. For the purpose of the argument before us on the preliminary point we must assume that the decree-holder has incurred a loss. If so, I do not doubt that he is entitled to compensation or damages. He was entitled to execute the decree; he did so. He was then ousted and it turns out that the judgment-debtor ousted him in reliance on a right which is found not to exist. That being so, the decree-holder, in my opinion, is entitled to compensation or damages. The question then arises whether he is to get the compensation or damages under S. 144, or by separate suit. In my opinion it must be under S. 144. That section lays down a law very different from the old law of S. 583, of the old Code. To begin with, by Cl. (2), which did not form part of the old section, it is enacted that no suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-S. (1). This indicates, with unmistakable clearness, that the intention of the law is to bar separate suits and to compel litigants to have these matters cleared up in execution proceedings.

Secondly, old S. 583 by its terms applied only to "benefit by way of restitution or otherwise" under a decree made in first appeal. There is no such restriction in S. 144, so the benefit may arise under a decree in second appeal, as it does in this particular case. Thirdly, the comprehensive nature of the section is emphasised by the words expressly empowering the Court to award interest damages, compensation or mesne profits. I read S. 144 as a part of the scheme of the Code as to executing decrees under appeal. Execution of such decrees is not forbidden nor even discouraged, as appears clearly from Rr. 5 to 8, O. 41 of the Code. But safeguards are provided. On the one hand, the decree-holder may be required to give security if he executes the decrees; on the other, the judgment-debtor may be required to give security in order to avoid having the decree executed. But this is not enough and S. 144, I think, supplies what is wanting and enables the Court to settle in execution all questions as to the loss one party or the other is put in executing any decree subsequently varied or reversed.

**Beaman and Heaton, JJ.**—(12*th March* 1918)—We will therefore under S. 98, Civil P. C., propose to state the following point of law for the decision of one or more Judges: Whether a plaintiff, who has obtained a decree in his favour in the trial Court and gone into possession under it, and has been put out of possession under the decree of the first Court of appeal reversing the trial Court's decree, (no claim for restitution having at this stage been preferred against him by defendant) and who has succeeded in the Court of second appeal which has restored the judgment of the trial Court, can claim any benefit under S. 144 in respect of the time he was dispossessed between the decree of the first and second apeal Courts?

**Beaman, J.**— (21*st June* 1918)—We think that the point we are considering, being one of frequent recurrence and great importance, had better be settled once for all by a Full Bench. As far back as 1879 the same point was decided by a Full Bench of this High Court. The decision there was that the procedure with which we are concerned was to be governed by the Civil Procedure Code and not by the Letters Patent. At that time the Civil Procedure Code contained no section corresponding with S. 4 of the present Code, and on that ground it might reasonably be contended that the decision of the Full Bench has become obsolete. On the other hand in the recent case of *Surajmal* v. *Horniman* (1) I find no reference whatever to the Full Bench's decision in *Appaji Bhivrav* v. *Shivlal Khubchand* (2) any my learned brother, who was a party to that judgment, cannot say that the case was cited. Again in the opening part of the learned Chief Justice's judgment I find him laying considerable stress on the fact that

(1) [1918] 47 I C. 449.
(2) [1878-79] 3 Bom. 204 (F. B.).

there was no long-established practice in appeals from the original side of the High Court supporting the view that they are governed by the Civil Procedure Code and not by the Letters Patent. There can be no doubt that rightly or wrongly there is a very long and well-established pratice, dating from the decision of 1879 of the Full Bench, and I believe pratically uniform and invariable up to the present day by which the second appeals from the mofussil are in this respect governed by the Civil Procedure Code and not by the Letters Petent. While I am not throwing any doubt on the correctness of the decision in *Surajmal's* case (1) and speaking for myself I can find no flaw in the reasoning, it is quite possible that on fuller argument other considerations might be adduced peculiar to second appeals from the mofussil which would dispose this Court to uphold the old and invariable practice. If we were to decide in accordance with the earlier Full Bench decision to-day, it seems to me quite probable that another Bench might prefer to follow the decision in *Surajmal's* case (1) and decide differently to-morrow. I, therefore think that it is eminently desirable that these doubts should be finally laid to rest by a decision of the Full Bench and the question we refer to it is: Whether in second appeals from the mofussil on the Appellate Side of this High Court where the Judges differ, the procedure is governed by S. 98 Civil P. C. or Cl. 36 of the Letters Patent.

**Heaton, J.**—(21*st*, 1918. *June.*)—I should be very glad if we could arrive at a definite decision now instead of referring the point to a Full Bench, but unfortunately it seems to me to be practically impossible for us to do this. The decision in *Surajmal's* case (1), to which I was a party, is expressly limited to appeals from the original side of this Court. There is a certain amount of argument in favour of making a distinction between original side appeals and mofussil appeals. When we turn to the decision in *Appaji Bhivrav* v. *Shivlal Khubchand* (2), which is a decision of a Full Bench of this Court, we find that nearly 40 years ago it was definitely laid down that in the case of mofussil appeals, where there is a difference of opinion, the procedure to be followed should be that prescribed by the Civil Procedure Code and not that prescribed by the Letters Patent. It is undoubtedly difficult for us to override this decision of the Full Bench, even though it appears that in the new Code there is a provision which did not appear in the old Code and which may support a view contrary to that taken by the Full Bench in 1879. It is, I think, more correct, more consonant with the dignity of the Court, seeing that there is what appears to us to be good reason for doubting whether the decision of the Full Bench of 1879 is now in accordance with the law that we should refer the point to another Full Bench.

## Opinion

**Scott, C. J.**—The question referred for consideration by the Full Bench is whether in second appeals from the mofussil on the Appellate Side of this High Court where the Judges dlffer, the procedure is governed by S. 98, Civil P. C. or Cl. 36 Letters Patent. There can, I think, be no doubt that the procedure must be taken to be governed by S. 98, Civil P. C. for the question has, as the referring judgment states, been decided by a Full Bench of this Court in 1879, and the practice dated from that decision has been practically uniform and invariable. The decision has also been approved by Full Benches in Calcutta: see *Gossami Sri Sri Gridhariji Maharaj Tickait* v. *Purushotum Gossami* (3) and in Allahabad in *Husaini Begam* v. *Collector of Muzaffarnagar* (4). The Full Bench in *Appaji Bhivrav* v. *Shivlal Khubchand* (2) considered that the provisions of the Letters Patent had been superseded by S. 575, Act 10 of 1877 so far as regards cases to which S. 575 was applicable. The terms of the reference would be satisfied by an answer in this sense.

The question, however has been argued whether the decision of 1879 in *Appaji Bhivrav* v. *Shivlal Khubchand* (2) should be extended to cases of appeal from judgments on the original side of the Court where the Appellate Judges differ or whether the recent decision in the case of *Surajmal* v. *Horniman* (1) should stand. In my opinion *Surajmal's* case (1) was rightly decided.

The genesis of Cl. 36 can be gathered from the despatch which accompanied the original Letters Patent of 1862. When the High Court was constituted by the

(3) [1884] 10 Cal 814 (F. B.)
(4) [1889] 11 All. 176.

Original Letters Patent, there was no provision to meet the case of Judges being equally divided in opinion upon appeal. Cl. 14 gave a right of appeal to the High Court in all cases of original civil jurisdiction from the judgment of one or more Judges of the High Court or of any Division Court, pursuant to S. 13, High Courts Act, provided that no such appeal should lie to the High Court from any decision made by a majority of the full number of Judges of the High Court but that the right of appeal in such cases should be to Her Majesty in Council. Appeals from Courts in the Provinces were governed by Cl. 15, which provided that the High Court should exercise appellate jurisdiction in such cases as were subject to appeal to Sadar Diwani Adaulat and which should become subject to appeal to the High Court by virtue of such laws or regulations relating to civil procedure as should thereafter be made by the Governor-General-in-Council. The Secretary of State for India, Sir Charless Wood, in his covering despatch of 14th May 1862, para. 25, said:

"It will appear, from a subsequent clause in the Letters Patent, that the proceedings in the High Court in civil cases are to be regulated by the Code of Civil Procedure enacted by the Legislature of India of which Act 23 of 1861 forms a part. By S. 23 of the last mentioned Indian Act, provision has been made for a difference of opinion on the hearing of an appeal. A difficulty, however may occur when two Judges, constituting a Division Court for the trial of cases in the exercise of original jurisdiction, differ as to the judgment to be given. For such a case, the Code of Civil Procedure, which is adapted to Courts of first instance, presided over by single Judges only, contains no provision. To call in a third Judge, and to retry the case, with a view to a judgment from which there may be an appeal to the High Court under Cl. 14, would be productive of unnecessary delay and expense to the parties; and I am of opinion that the Conrt should make provision for such a contingency, by a rule made under S. 13 of the Act of Parliament, providing either that the judgment shall be in accordance with the opinion of the senior of the Judges constituting the Division Court, or that the final judgment shall be entered pro forma, according to such opinion, such judgment being a judgment for the purpose of an appeal against the same, but not for any other purpose."

The subsequent clause in the Letters Patent referred to by him was Cl. 37. He observes in the despatch, para. 36:

"Cl. 37 is a very important one, and, there is little doubt, will prove a very salutary provision. It has therefore been inserted, although the change introduced is somewhat greater and more substantial than is generally aimed at in this Charter. It extends to the High Court the Code of Civil Procedure enacted by the Legislature of India for the Courts not established by Royal Charter, and thus accomplishes the object so long contemplated of substituting one simple code of procedure for the various systems (corresponding to its Common Law, Equity and Admiralty Jurisdiction) which have been in operation in the Supreme Court since the date of its establishment."

The suggestion of the Secretary of State that a rule should be made under S. 13 of the Act of Parliament that is the High Courts Act, 24 & 25 Vic. c. 104, was not given effect to. But in the amended Letters Patent an express provision was made for the case of Judges differing in opinion by Cl. 36, which runs as follows:—

"And we do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Bombay in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or any Division Court thereof, appointed or constituted for such purpose, under the provisions of S. 13, of the aforesaid Act of the 24 and 25 years of our reign; and if such Division Court is composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, sush point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority, but if the Judges should be equally divided then the opinion of the senior Judge shall prevail."

Clause 15 of the amended Letters Patent also referred to the case of difference of opinion among the Judges of the High Court in relation to appeals to the Privy Council providing that an appeal:

"shall also lie to the said High Court from the judgment not being a sentence or order as aforesaid of two or more Judges of the said High Court or of such Division Court, wherever such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the said High Court for the time being; but that the right of appeal from other judgments of Judges of the High Court or of such Division Court shall be to us, our heirs or successors, in our or their Privy Council, as hereinafter provided."

Clause 36 of the amended Letters Patent is expressed to apply to cases arising in the performance of any function directed by the Letters Patent to be performed by the High Court in the exercise of its original or appellate jurisdiction, and it may be contended that if the latter part of Cl. 36 has been superseded by S. 575 of the Code of 1877, as decided in *Appaji Bhivrav* v. *Shivlal Khubchand* (2), this clause of the Letters Patent must be taken to be no longer in force. There are however as it seems to me, cogent rea-

sons for holding that Cl. 36 is in force without modification in so far as it relates to proceedings on the original side of the High Court and appeals from Judges of the High Court. In the first place S. 129 of the present Civil P. C. corresponding with Cl. 3. S. 652 of the Code of 1882, provides that

"notwithstanding anything contained in this Code, any High Court established under the Indian High Courts Act, 1861, may make such rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code."

The effect of this provision was to bring the Code into harmony with the Letters Patent and to enable the High Courts to regulate the exercise of their original civil jurisdiction accordingly. Thus the High Court may make rules regulating the procedure in cases falling under the second part of Cl. 36 of the Letters Patent, but may not make any such rules which would be inconsistent with that clause unless it can be said that the clause has been impliedly repealed. The law as to repeal by implication is thus stated in *Conservators of the Thames* v. *Hall* (5):

"The Court must be satisfied that the two enactments are inconsistent before they can from the language of the later imply a repeal of an express prior enactment,"

and the rule laid down by Sir Orlando Bridgman (in his Judgments, p. 121, 127, *Lyn* v. *Wyn* (6), was quoted that:

"The law will not allow the exposition to revoke or alter by construction of general words, any particular statute, where the words may have their proper operation without it."

In *Warrington, Ex parte* (7) Turner, L. J. said:

"I take the rule of law to be that an affirmative statute is not without express words repealed by a subsequent affirmative statute unless the two statutes cannot stand together."

It has never been held that any part of Cl. 36 of the Letters Patent, has been repealed for it is not mentioned in the schedule of repeals annexed to the Civil Procedure Code of 1877. The Court in *Appaji Bhivrav* v. *Shivlal Khubchand* (2) thought the clause to some extent had been "superseded" by S. 575. It had not been removed from the statute book. According to Craies on Statute Law, p. 295, among enactments considered as having ceased to be in force although not expressly and specifically repealed are statutes which have been "superseded," i. e, where a later enactment effects the same purposes as the earlier one by repetition of its terms or otherwise.

Section 4 of the Code may also be referred to in this connexion. That section reproduces in general language S. 4 of the Code of 1882, which expressly saved the application of the Code to the Central Provinces Civil Courts Act of 1865, the Lower Burma Courts Act of 1875, and the Punjab Civil Courts Act of 1877, and the Oudh Civil Courts Act of 1879, or any law there to fore or hereafter passed under the Indian Councils Act of 1861. S. 4 of the present Code is far more general in its terms than S. 4 of the Code of 1882, for it applies to any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force, and sub-S. (2) is enacted in particular and without prejudice to the generality of the propositions contained in sub-S. (1). It is to be noted that the Lower Burma Courts Act of 1875, and the Punjab Courts Act of 1877 contained special provisions for the case of judges in appeal being equally divided in opinion, which were inconsistent with S. 575 of the Code of 1882 and S. 98 of the present Code, and I am of opinion that the generality of the words used in the present S. 4 should be held to cover the express provisions of the High Court Letters Patent, Cl. 36.

On the other hand, S. 117 of the Code states that save as provided in this part or in Part 10 or in rules, the provisions of this Code shall apply to such High Courts. In view of the other provisions of the Code (and particularly of S. 129 which is in Part 10) this section does not present any difficulty to my mind. The Code must be applied so far as may be to the High Court, and the practice, following on the decision in *Appaji Bhivrav* v. *Shivlal Khubchand* (2), permits of the application of S. 98 to many cases falling within the High Court jurisdiction. In my opinion S. 98, like S. 104, read with O. 43, R. 1, must be taken to apply to appeals from Courts of inferior jurisdiction to the High Court, and not to appeals from one or more Judges of the High Court. In *Gossami Sri*

(5) [1868] 3 C. P. 415.
(6) [1665] O. Bridg. 122.
(7) [1853] 22 L. J. Bk. 33.

*Sri Gridhariji Maharaj Tickait* v. *Purushotum Gossami* (3) a Full Bench of the Calcutta Court, who were dealing with a case on the original side of the Court under the Code of 1882, which at that time did not contain the clause subsequently added to S. 652, agreed that the effect of S. 575 was to supersede the provision in Cl. 56 of the Letters Patent that in the event of any disagreement between two Judges of a Division Bench, the judgment of the Senior Judge shall prevail; but and still that, notwithstanding that section, Cl. 15 of the Letters Patent remained in full force, because if the appeal under Cl. 15 of the Charter were taken away, a judgment in the High Court of a Judge in a Division Bench, who agreed with the Court below upon a question of fact, would be absolutely final, and owing to the provisions of S. 597, Civil P. C. no appeal would lie to the Privy Council from such decision. The result arrived appears to me, with all respect, to involve an unnecessary inconsistency.

The reasoning of the Judges of the Madras High Court in *Sabhapathi Chetty* v. *Narayanasami Chetty* (8), a case arising on the original side, is applicable to the question now under consideration. The couclusion there arrived at, that sections 588 and 591, Civil P. C., did not interfere with or supersede Cl. 15 of the Letters Patent, had already been come to by a Full Bench of the Madras High Court in *Chappan* v. *Moidin Kutti* (9), by a Full Bench of the Calcutta High Court in *Toolsee Money Dassee* v. *Sudevi Dassee* (10) and by the Privy Council in *Hurrish Chunder Chowdhry* v. *Kalisunderi Debi* (11). A Full Bench of the Allahabad High Court in *Husaini Begam* v. *Collector of Muzaffarnagar* (4) was of opinion that Cl. 27, Allahabad Letters Patent, corresponding with Cl. 56 Bombay Letters, was superseded in those cases only to which S. 575, Civil P. C., properly and without straining language applied. There was, therefore no absolute supersession of the provisions of the Letters Patent. In *Roop Laul* v. *Lakshmi Doss* (12) the Court held that S. 575, Civil P. C., did not apply in the case of appeals under Cl. 15 Letters Patent from judgments of the High Court in the exercise of its original jurisdiction, and that under Cl. 36 where the Judges are equally divided in opinion, the judgment of the senior Judge would prevail, basing its conclusion upon the reasoning of the Court in *Sabhapathi Chetti's* case (8). It appears to me, therefore, both upon the provisions of the Code and the Letters Patent and the reported decisions of this and other High Courts, that the procedure under Cl. 36 should be followed in case of appeals from the original side. It should also be followed in other cases to which S. 98 cannot properly and without straining language be applied, as was decided by the Allahabad High Court in *Husaini Begam* v. *Collector of Muzaffarnagar* (4) and in the later case of *Lachman Singh* v. *Ram Lagan Singh* (13).

**Heaton, J.**—I concur.

**Macleod, J.**—Cl. 15 of the Letters Patent ordains that an appeal shall lie to the High Court from the judgment of one Judge of the High Court or one Judge of any Division Court pursuant to S. 13, High Courts Act. S 96, Civil P. C. enacts that, save, where otherwise expressly provided in the body of the Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decision of such Court. And S. 108 enacts that the provisions of Part 7 relating to appeals from original decrees shall, so far as may be, apply to appeals from appellate decrees. S. 96, therefore, does not deal with appeals under Cl. 15 of the Letters Patent and, therefore, I think, it follows that the provisions of S. 98 are not applicable to such appeals, but they may be taken as altering or amending the provisions of Cl. 36 of the Letters Patent with respect to second appeals on the appellate side of the High Court, as was decided in *Appaji Bhivrav* v. *Shivlal Khubchaud* (2) except that the less accurate expression "supersede" was used.

**Shah, J.**—I agree with the learned Chief Justice.

**Hayward, J.**—I think this is a case in which a consideration of the contemporaneous circumstances surrounding the legislation in this somewhat intricate matter is essential for a right apprecia-

(8) [1902] 25 Mad. 555.
(9) [1899] 22 Mad. 68 (F. B.).
(10) [1899] 26 Cal. 361.
(11) [1183] 9 Cal. 482=10 I. A. 4 (P. C.).
(12) [1906] 29 Mad. 1.
(13) [1904] 26 All. 10.

tion of the intentions of the Legislature. The Chief Court of the civil jurisdiction for the presidency town was the Supreme Court and its procedure was governed by the Letters Patent of 1824. It was there provided (proviso to para. 11) that a difference of opinion between the Judges shuld be decided by the casting vote of the Chief Justice. It was not, however, a Court of Appeal. The Chief Court of civil appeal for the Mofussil was the Sadar Diwani Adaulat and its procedure was governed by Regulation II of 1827. It was there provided (S. 9) that a difference of opinion should be decided by the casting vote of the senior Judge. This was subsequently modified by the provision for affirmation on fact and reference on law to a third Judge in S. 332, Civil P. C. 1859, as amended by S. 23, Act. 23 of 1861.

The Supreme Court and the Sadar Diwani Adaulat were combined to form the present High Court by the Letters Patent of 1862 and this was constituted (Cls. 14 and 115) a Court of Appeal both from the Judges exercising the original civil jurisdiction of the High Court, and from the Civil Courts of the mofussil subject to the High Court. But no provision was made for a difference of opinion between two or more Judges exercising the original civil jurisdiction of the High Court, though this was provided for in the case of Judges exercising the appellate civil jurisdiction of the High Court by the incorporation (Cl. 27) of the procedure prescribed by the Civil Procedure Code.

This defect was pointed out in para 23 of the Despatch of the Secretary of State forwarding the Letters Patent of 1862, and it was suggested that a rule should be made for deciding differences of opinion between Judges exercising orlginal civil jurisdiction according to the opinion of the senior Judge. No such rule was, however, made and the matter remained for disposal by the Amended Letters Patent of 1865. The Court was then constituted (Cl. 15) a Court of appeal from one Judge or more differing Judges, whether exercising the original or appellate civil jurisdection of the High Court. It was also constituted (Cl. 16) a Court of appeal as be fore from the civil Courts of the mofussil subject to the High Court. It was then probided (Cl, 36) that a difference of opinion between two or more Judges should be decided according to the opinion of the senior Judge, whether in the exercise of the original or appellate civil jurisdiction of the High Court. But there was no longer any express incorporation (Cl. 37) of the procedure prescribed by the Civil P. C.

It appears to me the result was that differences of opinion between two or more Judges had to be decided in all cases according to the opinion of the senior Judge, whether they arose in the exercise of the original civil jurisdiction of the High Court or in the exercise of the appellate civil jurisdiction over other Judges of the High Court or in the exercise of the appellate civil jurisdiction over the civil Courts of the mofussil subject to the High Court. It does not appear whether the rule was ever acted on in the exercise of the original civil jurisdiction.

It would be the appropriate rule to prevent the waste of time and money involved in a retrial, but it would hardly be likely to have been often used as original suits have seldom been heard before more than one Judge of the High Court. It does not appear from the remarks in the case of *Surajmal* v. *Horniman* (1), that it was regarded strictly in the exercise of the appellate civil jurisdiction over other Judges of the High Court, but it was followed in the case of *Collector of Ahmedabad* v. *Samaldas Bechardas* (14), decided in 1872, in exercise of the appellate civil jurisdiction over the civil Courts of the mofussil subject to the High Court. It does not appear to me arguable that the rule would not still apply in the exercise of the original civil jurisdiction, because no authority purporting to substitute any other procedure has been produced. But it has been argued that it would no longer, apply in the exercise of the appellate civil jurisdiction over either the other Judges of the High Court or the civil Courts of the mofussil subject to the High Court in view of the recognition of the powers of the Indian Legislature in Cl. 44 of the Amended Letters Patent of 1865 and in view of the provision for affirmation on fact and for reference on law to a third Judges in cuse of differences of opinions between Judges of Appeal Courts in S. 575 Civil P. C , of 1877 and the provision in S. 632 applying the Code unlike previous Codes to the Chartered High Courts. These provisions have been re-

peated in Ss. 575 and 632, Civil P. C., of 1882 and in Ss. 98 and 117 of the present Civil P. C.,of 1908.

It appears to me the rule would, as held in the case of *Surajmal* v. *Horniman* (1), still apply in the exercise of the appellate civil jurisdiction over the other Judges of the High Court. It has already been indicated that this jurisdiction has arisen entirely out of the Letters Patent; while the appellate civil jurisdiction over the civil Courts of the mofussil subject to the High Court has been derived from the provisions of S. 332, Civil P. C., of 1859 as amended by S. 23, Act 23 of 1861. These provisions did not apply to the Chartered High Courts but they were repeated verbatim in Ss. 540 and 575 of the subsequent Codes of 1877 and 1882 and in Ss 96 and 98 of the present Code, which have been applied to the Chartered High Courts. It appears to me to follow that the natural place to find the rules governing the exercise of the appellate civil jurisdiction over the other Judges of the High Court would be the Letters Patent; while the natural place to find the rules governing the exercise of the appellate civil jurisdiction over the civil Courts of the mofussil subject to the High Court would be the Civil P. C. This natural presumption would appear strengthened by the express reference to civil Courts subordinate to the High Court in S. 584 of the Codes of 1877 and 1882 and in S. 100 of the present Code. This moreover was the view taken in 1882 of the analogous S. 588 of the Codes of 1877 and 1882, now S. 104 of the present Code, in the case of *Hurrish Chunder Chowdhry* v. *Kalisunderi Debi* (11), where the provisions of S. 588 were held (p. 494) not to apply to appeals from one of the Judges to other Judges of the High Court by their Lordships of the Privy Council. It is true that this view was not taken in 1883 in the case of *Gossami Sri Sri Gridhariji Maharaj Tickait* v. *Purushotum Gossami* (3) by the Full Bench of the Calcutta High Court, but it would appear that that Bench was not referred to the decision in the previous year by the Privy Council. It was however accepted in 1898 in the case of *Chappan* v. *Moidin Kutti* (9) by a Full Bench of the Madras High Court and again in 1899 in the case of *Toolsee Money Dassee* v. *Sudevi Dassee* (10) by a subsequent Full Bench of the Calcutta High Court. It was again followed in 1902 in the case of *Subbapathi Chetti* v. *Narayanasami Chetti* (8) by a subsequent Bench of the Madras High Court, where it was pointed out (pp. 558 and 559, *of I. L. R. 25 Mad.*) that appeals were not contemplated from one of the Judges to the other Judges of the High Court but merely from the civil Courts subordinate to the High Court by the appellate provisions of the Civil Procedure Code as laid down by the Privy Council. This view was again followed in 1903 in the case of *Lachman Singh* v. *Ram Lagan Singh* (13) by a Bench of the Allahabad High Court and again in 1905 in the case of *Roop Laul* v. *Lakshmi Doss* (12) by a third Bench of the Madras High Court. It was finally observed by Sir Lawrence Jenkins, C. J., in 1915 that

"the Code makes no provision for an appeal within the High Court, that is to say, from a single Judge of the High Court. This right of appeal depends on Cl. 15 of the Charter" [in the case of *Debendra Nath Das* v. *Bibudhendra Mansingh* (15)].

These observations would not appear to have been brought to the notice of Sanderson, C. J., later in the same year in the case of *Mathura Sundari Dassi* v. *Haran Chandra Shaha* (16). There Woodroffe, J., relied solely on the Charter, though Mookerjee, J., relied both on the Code and the Charter. The Judges differed, therefore in the ratio decidendi and deprived the decision of the authority that would otherwise have attached to it as the latest decision of the Calcutta High Court. It appears to me, therefore upon these considerations and authorities including that of the Privy Council that the civil appellate jurisdiction over civil Court subordinte to the High Court was alone in view when the Civil Procedure Codes were, by S. 632 of the Codes of 1877 and 1882 and by S. 117, of the present Code, made applicable to the Chartered High Courts by the Indian Legislature.

It was held in this particular matter so long ago as 1879 in the case of *Appaji Bhivrav* v. *Shivlal Khubchand* (2) by a Full Bench of this Court that the appellate civil jurisdiction over the civil Courts of the mofussil subordinate to the High Court was governed by the provisions of the Civil Procedure Code, and it would appear that that decision has con-

(15) [1916] 43 Cal. 90=33 I. C. 745.
(16) [1916] 43 Cal. 857=34 I. C. 634.

sistently been followed ever since by this Court. It was so held similarly in the case of *Husaini Begam* v. *Collector of Muzaffarnagar* (4) by the Allahabad High Court, and it would appear to be in accord with the intention as indicated in the other authorities already discussed with which the Civil Procedure Codes were extended to the Chartered High Courts by the Indian Legislature. It has not been argued before us and need not perhaps be here debated in view of nearly 40 years' unquestioned practice, that the extension was in this particular matter ultra vires of the Indian Legislature. But it has been pointed out by Markby, J., in *Feda Hossien, In the matter of the petition of* (17) that special powers such as those granted by Cl, 36, of the Letters Patent, would not, though general powers such as those merely repeated by Cl. 39, of the Letters Patent would, be subject to the legislative powers of the Government of India. His view was that the provisions of Cl. 44, of the Letters Patent merely referred to the powers specially reserved to the Legislative Council of the Government of India by Ss. 9, 11 and 13, High Courts Act 1861, in derogation of the general limitations of their powers prescribed by Cl. 6, of the proviso to S. 22, Indian Councils Act 1861. That view would appear to have been accepted in the subsequent case of *Empress* v. *Burah* (18) by the Full Bench of the Calcutta High Court but not to have been brought to the notice of the learned Judges in the latest case of *Mathura Sundari Dassi* v. *Haran Chandra Shaha* (16) before the Calcutta High Court. It would appear to me that the views expressed by Markby, J., would require further and particular investigation should further conflict arise between the provisions of the Letters Patent and enactments of the Legislative Council of the Government of India.

(The appeal come on for final hearing before Shah, J., who on 27th October 1918 delivered the following judgment,)

**Shah, J.** — In consequence of the difference of opinion between Beaman and Heaton, JJ., the following point of law has been referred to me for decision under S. 98, Civil P. C:

"Whether a plaintiff, who has obtained a decree in his favour in the trial Court and gone into possession under it, and has been put out of possession under the decree of the first Court of appeal reversing the trial Court's decree (no claim for restitution having at this stage been preferred against him by the defendant), and who has succeeded in the Court of second appeal which has restored the judgment of the trial Court can claim any benefit under S. 144 in respect of the time he was dispossessed between the decrees of the first and second appeal Courts."

I am of opinion that the plaintiff can claim such benefit under S. 144, Civil P. C. The words of the section are plain and cover the case of the plaintiff claiming the benefit of the section under the circumstances stated in the point of reference. I do not quite follow the significance of the parenthetical clause in the question, viz.,

"no claim for restitution having at this stage been preferred against the defendant."

It probably refers to such claim for restitution in the form of compensation under the intermediate decree, as has been mentioned in the judgment of Beaman, J. The defendant however in recovering back the possession under the intermediate decree did make a claim for restitution, though not for restitution by way of compensation. In the view I take of the point it makes no difference whether the defendant did or did not make a claim for restitution in any sense under the intermediate decree. The section provides that the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree as has been reversed: and for this purpose the Court may make any orders, including orders for the payment of damages or compensation, which are properly consequential on such reversal. The words "any party" include a plaintiff and cannot be interpreted as meaning a defendant only. The plaintiff claims to be entitled to a certain benefit in virtue of the decree in second appeal and is entitled to be placed in the position which he would have occupied but for the decree of the Court of first appeal which was reversed; and on his application the Court may make an order for damages or compensation properly consequential on such reversal suited to the circumstances of the case. I am unable

(17) [1875-76] 1 Cal. 431.
(18) [1877-78] 3 Cal. 63 (F.B.).

to see how the plaintiff's application for damages or compensation can be properly held to be outside the scope of the section, having regard to the words of the section, which are plain, and which I am bound to read in their ordinary and natural sense. It may be that the section includes some cases, which may not be cases of restitution in the ordinary acceptation of the term; and it may be that if the words of the section were not clear, there may be some ground for refusing to treat them as cases of restitution. But where the legislature has adopted a comprehensive phraseology, I do not think its scope could be properly curtailed by reference to any principle, which, though simple and uniform, yields the result that

" in no case can a plaintiff ask for restitution or any of its concomitant modes under S. 144."

contrary to the words of the section. If the legislature intended that S. 144 should not apply to a plaintiff in any case, the words "any party" could not have been appropriately used. It may be that the plaintiff, who has obtained a decree in his favour for the first time in second appeal or after having obtained it in either of the lower Courts has not proceeded to execute it, may not be able to take advantage of S. 144. But that is no ground in my opinion for holding that the plaintiff, who has obtained possession in execution of the decree of the trial Court and is subsequently dispossessed under the decree of the District Court, cannot claim the benefit of S. 144, if finally the decree of the District Court is reversed, and it is found that his dispossession under it was not justified.

It is contended by Mr. Abhyankar for the defendant, first, that when the plaintiff finally obtains a decree in his favour, he can execute it under S. 47 and that to such a case S. 144 has no direct and natural application; and secondly that when the plaintiff obtains the final decree, it is open to him to ask the final Court of appeal to make proper provision in the decree for such relief as he may be entitled to by way of interest, damages or compensation in consequence of an erroneous decree of the lower Court, and that it is an additional ground for holding that S. 144 is not intended to apply to the case of a plaintiff, who can get the necessary relief by the terms of the decree and by execution under S. 47 Civil P. C.

I do not think that these considerations can justify the conclusion that S. 144 cannot apply to a plaintiff at all. It may be that to a large extent the plaintiff may be able to secure the relief given him by the final decree by an application under S. 47. But the circumstance that within certain limits the ground covered by Ss. 47 and 144 is common as regards a plaintiff under certain circumstances, affords no basis for holding that there can be no ground open to the plaintiff under S. 144 which is not covered by S. 47 of the Code.

As regards the contention that as the relief may be given by the decree it cannot be claimed under S. 144, I think it must be disallowed. It may be possible in some cases for the Court in second appeal to make provision for such relief as the plaintiff claims in the present proceedings. But it is possible that in many cases, whether the provision is to be made for the benefit of the plaintiff or the defendant, the Court may not make any such provision for various reasons. At the time of passing the decree the Court is chiefly concerned with the adjustment of the rights of the parties without any reference to the rights arising in consequence of the change of possession during the pendency of the litigation under the decree, under appeal; and it may not be possible always for the Court to determine matters which are properly determinable under S. 144. Thus the absence of any such provision in the decree is not necessarily a ground for refusing the relief under S. 144. It may be that where the Court, while passing the decree, has adverted to any particular point covered by S. 144 and refused to grant relief on that point, any application under that section for the same relief will be refused. But such a refusal would be based on a different ground altogether; and the absence of any relief on the point, which it may be possible to provide for but has not been in fact provided for in the decree, is not a ground for holding that S. 144 cannot apply to the case of a plaintiff. The plaintiff, in my opinion, is entitled to apply, and when the application comes to be considered on its merits, it will be open to the defendant to establish, if he can, that the particular relief which the

plaintiff claims is definitely refused by the Court passing the final decree.

On these grounds I hold that the application of the plaintiff for an order for the payment of damages or compensation from the date of dispossession under the decree of the District Court until the date of the restoration of that possession under the decree in second appeal reversing the decree of the District Court is clearly within the scope of S. 144.

I have nothing to do at this stage with the merits of the claim, and express no opinion whatever thereon. It will be for the lower Court to determine whether under the circumstances the plaintiff has made out any case for an order for the payment of damages or compensation properly consequential on the reversal of the decree. I agree with Heaton, J., that this appeal should be allowed. The result of allowing the appeal is that the orders of the lower Courts are set aside and the application is remanded for disposal by the Court of first instance according to law. Costs to be costs in the application.

The consequential order, which I make is not stated in terms in the judgment of Heaton, J., and there is no rule as to the procedure to be followed when the decision of the point referred to a Judge under S. 98 is not sufficient by itself to dispose of the appeal completely but when some further order becomes necessary for the proper disposal of the appeal. The practice under the Code of 1882 cannot afford any assistance, as under the old S. 575 the appeal, and not only the point of law, was to be decided by the Judge or Judges to whom the reference was made. Under these circumstances, as the order is consequential, I have consulted Heaton, J., about it, and he agrees that that is the order which he would have made if he had been able to dispose of the appeal.

This case illustrates the desirability of making definite rules regulating such references.

G.P./R.K. *Appeal allowed.*

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## A. I. R. 1919 Bombay 12

SHAH, J.

*Jana Appa Sutar*—Appellant.

v.

*Rakhma Narain Badiger*—Respdt.

Second Appeal No. 17 of 1916, Decided on 24th September 1918.

**Hindu Law—Succession—Sister—Full sister is preferred to half-sister.**

Under the Mitaksbara as between a full sister and a half-sister the former is the preferential heir to her deceased brother. [P 14 C 2]

*S. Y. Abhyankar* and *S. R. Gokhale*—for Appellant.

*Nilkant Atmaram*—for Respondent.

**Judgment.** — The question of law arising in this second appeal is whether as between a full sister and a half-sister the former is the preferential heir or both of them are heirs to their deceased brother under the Mitakshara. Both the lower Courts have answered it in favour of the full sister. In support of the case for the half-sister it is urged that neither in the Mitakshara nor in the Vyavahara Mayukha is any preference shown to the full sister over the half-sister, and that the preference of the whole to the half-blood under the Mitakshara is confined to brothers and nephews, as pointed out in *Samat* v. *Amra* (1) and *Vithalrao* v. *Ramrao* (2). There is apparently no decided case in this Presidency directly bearing on the point. The position of the sister as an heir has been considered in several cases, and it is not disputed before me that under the Mitakshara as under the Mayukha the sisters would be heirs, and that they would come in after the grandmother. The ground upon which the sister has been assigned this place as an heir under the Mitakshara has been a matter of some controversy and difference of opinion, as the judgments in *Sakharamsadashiv Adhikari* v. *Sitabai* (3), *Kesserbae* v. *Valab Raoji* (4), *Mulji Purshotum* v. *Cursandas Natha* (5) and *Bhagwan* v. *Warubai* (6) would show. The question, which I have to consider, relates to the preference of the whole to the half-blood, whatever the position of sisters as heirs may be in competition with other relations.

It is clear that Vijnanesvara does not refer to sisters in his commentary relating to the order of succession; and the ground upon which her position as an heir is determined may have some bearing upon the present question. I do not think however that it is necessary to discuss these grounds. It is clear that if the

(1) [1881] 6 Bom. 394.
(2) [1900] 24 Bom. 317.
(3) [1878] 3 Bom. 353.
(4) [1879] 4 Bom. 188.
(5) [1900] 24 Bom. 563.
(6) [1908] 32 Bom. 300.

word "brothers" (bhratra) used in Yajnavalkya's text and in the commentary is interpreted as including sisters, the half-sister will have no case. In that case she will come in after the full sister as the half brother comes in after the full brother. I do not think that that interpretation can be pressed against the half sister, since it has been practically rejected in determining the sister's position as an heir under the Mitakshara.

Quite independently of this interpretation, Vijnanesvara gives a clear indication that the question of preference arising in this appeal must be determined by the test of propinquity: and according to that test the sister is the preferential heir. In dealing with the case of parents, Vijnanesvara applies the test of propinquity and it is significant that he treats the mother's propinquity as of a specially high order, and gives her a place before the father in the list of heirs (see Mitakshara, Ch. 2, S. 3, paras. 3, 4 and 5; Stokes' Hindu Law-Books, pp. 442-443). In dealing with the case of brothers he gives preference to brothers of the whole blood on the strength of the text, which he cites in discussing the case of the mother, viz., "to the nearest sapinda the inheritance belongs". He prefers the brothers of the whole blood, "since those of the half-blood are remote through the difference of the mothers" (see Mitakshara, Ch. 2, S. 4, para. 5; Stokes' Hindu Law Books, p. 445). There is no reason whatever why the same reasoning should not apply to the case of sisters. It is also clear that according to Vijnanesvara's definition of sapindaship given in his commentary on verse No. 52, Acharadhyaya, the full sister would be the nearer heir: and his specific application of it to the case of brothers shows that the same view should prevail in the case of sisters.

In the Vyavahara Mayukha there is no reference in terms to the case of a half-sister though the case of 'sister' is specifically dealt with. Nilkantha does not accept Vijnanesvara's view as to the preference to be given to the mother over the father. But his preference of the whole to the half-blood is more marked than Vijnanesvara's in the case of brothers, as he assigns a much lower position to half-brothers in the list of heirs. Thus Nilkantha's view, so far as it goes, supports the conclusion in favour of the full sister based on the Mitakshara. No doubt under the Mayukha the anomaly of preferring her as an heir to a half-brother might arise, if her position as an heir is determined by treating her as included in the word 'sister' used by Nilkantha in discussing the sister's place as an heir. That consideration however is not relevant to the present point.

It is hardly necessary to go beyond these two books to justify the conclusion in favour of the full sister. As the Nirnaya Sindhu and the Dharma Sindhu are works which may be referred to, I may point out that in determining the order of persons entitled to perform the shradhs both Kamalakara Bhatta and Kashinath, the respective authors of the two treatises, mention the full and half-sisters and give preference to the full sister. I have quoted the relevant passages* from these books for easy reference in a foot-note. I do not wish to lay undue emphasis on these opinions. But they are valuable as referring specifically to the relative position of full and half sisters in the matter of performing the shradhs. I have not been able to find any reference to the full and half sisters elsewhere. In *Kesserbai* v. *Valab Raoji* (4) at p. 207

*In the absence of a brother's son, shradhs wil be performed by the following relatives in this: order father, mother, daughter-in-law, sister and sister's son because these relatives succeed in this very order to the property (if any) left by the deceased. Katyayana has laid down in his work known as 'Madan Ratna' that "the obsequies of a brother can be performed both by his elder sister as well as by the younger sister. In the absence of a full sister, a step-sister is entitled to perform the obsequies, and failing both, the sons of a full sister, and in their absence the sons of a step-sister will (perform the shradhs) —Nirnaya Sindhu—(published by the Nirnaya Sagar Press, 2nd Edn. p. 273, or the edition published by the same press with the Gujarati translation at p. 573).

As between a full-brother and a half-brother, the full (and not the half) brother has the preference. If however there is no full brother, the half-brother will perform (the shradhs). Failing a brother, the nephew, and as among nephews also, a full brother's son will have the preference. If there is no nephew of full blood, the nephew of half blood shall offer the funeral cake. Failing a nephew, whether of full blood or half blood, the father, and failing him, the sister shall perform them, and among sisters, the same rules as to preference of full blood over half blood will apply—Dharma Sindhu—(published by Janardhan Mahadev Gurjar, in the same press, 2nd Edn., p. 282, or the edition published by the same press with the Gujarati translation at p. 485).

of the report Sir Michael Westropp, C. J., has observed that

"The Nirnaya Sindhu, which specially names the half-sister as entitled to rank (in the performance of ceremonies, whence her heirship may be inferred), places her after, not on a level with the sister."

Looking at the question from the point of view of the recognition of the rights of the sister as an heir, on the ground of positive acceptance and usage after Vijnanesvara wrote his commentary, there is no reason to suppose that there has been any positive acceptance or usage in favour of ignoring the distinction which exists between sisters of the whole and the half-blood. There is nothing in the reported decisions to countenance such a view, and the fact that the distinction is undoubtedly recognized in the case of brothers and nephews and that it is referred to specifically in relation to sisters in such modern works as the Nirnaya Sindhu and the Dharma Sindhu is undoubtedly against the possible suggestion that the distinction between the whole and the half-blood is not recognized in practice by the Hindu community as regards the sisters.

Lastly, it is urged on the strength of the observations in *Samat* v. *Amra* (1) and *Vithalrao* v. *Ramrao* (2) that the preference of whole over the half-blood is confined to brothers and nephews. In neither of these decisions is the case of sisters referred to; and the decisions relate to male relations who come in as heirs after the sisters. The case of sisters is really indistinguishable from that of brothers so far as the test of propinquity is concerned. Westropp, C. J., in dealing with the point that arose in *Samat's* case (1) observes that in the Mitakshara and the Mayukha there is no distinction made on the basis of the full and half-blood relationship except in the case of brothers and brothers' sons. I cannot believe that in making the above observation in *Samat's* case (1) Sir Michael Westropp had any intention to express a dissent from the opinion which he had expressed in *Kesserbai's* case (4) as to the full and half sisters, and to which I have referred above. Besides in that case the question of preference among sapindas of the same degree of descent from the common ancestor did not arise. Even according to the test adopted in *Samat's* case (1) that the nearest Gotraja Spinda succeeds, the full sister would be the nearer heir. It is hardly necessary to refer to the grounds mentioned by Nilkantha in determining the sister's place as an heir next after the grandmother, relating to her having both sapindaship and gotrajatva, though there may be no community of gotra (sagotrata). But I prefer to distinguish the case on the ground that the present point is not decided there and the ratio decidendi does not involve the result that there is no distinction to be made between the full and half-sisters. As regards *Vithalrao's* case (2), it is not possible to treat it as deciding or expressing any opinion as to the present point. Sir Lawrence Jenkins, C. J., has based his decision on the principle of stare decisis and Ranade, J.'s, observations have reference to relations, who according to decided cases come in after the sisters. His observations relating to different kinds of propinquity have no application to the case of sisters, which, as I have already stated, is not distinguishable from that of brothers so far as the difference between the whole and the half-blood is concerned.

In the view I take of these two decisions, it is not necessary to consider the argument urged on behalf of the first respondent (i. e , the full sister) that the decisions in *Ganga Sahai* v. *Kesri* (7), *Sham Singh* v. *Kishun Sahai* (8) and *Nachiappa Gouden* v. *Rangasami Gounden* (9) require that the view taken in *Vithalrao* v. *Ramrao* (2) should be reconsidered. The argument is that, as pointed in *Ganga Sahai's* case (7) :

"the preference of the whole blood . . . is confined to members of the same class, or, to use the language of the Judges of the High Court in *Suba Singh* v. *Sarafaraz Kunwar* (10), to 'sapindas of the same degrees of descent from the common ancestor.' "

If it had been necessary to examine this argument and to re-consider the decision in *Vithalrao's* case (2), I should have referred this appeal to a Division Court. As it is, I feel no difficulty in deciding the point in favour of the full sister I need hardly add that if *Ganga Sahai's* case (7) is to be accepted as overruling *Vithalrao* v. *Ramrao* (2), as to which I express no opinion, I should not consider any independent examination of this point necessary at all, as in that

(7) A. I. R. 1915 P.C. 81=37 All. 545=42 I. A. 177=30 I C. 265 (P C.).
(8) [1907] 6 C. L. J. 190.
(9) [1915] 26 I. C. 757.
(10) [1897] 19 All. 215 (F.B.).

event *Ganga Sahai's* case (7) would settle it in fovour of the full sisters. I have thought it necessary to examine the point with reference to the sister's position as an heir in this Presidency, in consequence of the decisions in *Samat* v. *Amra* (1) and *Vithalrao* v. *Ramrao* (2) quite apart from *Ganga Sahai's* case (7). I therefore confirm the decree of the lower appellate Court and dismiss the appeal with costs.

G.P./R.K. *Appeal dismissed.*

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## A. I. R. 1919 Bombay 15

MARTEN, J.

*Khemchand Issardas*—Plaintiff.

v.

*Khairuddin Ranglahi*—Defendant.

Original Civil Suit No. 355 of 1918, Decided on 15th February. 1919.

**Civil P. C. (5 of 1908), O. 35, R. 4—Interpleader suit—Both claimants absent—Procedure to be followed stated—Plaintiff should be discharged after crediting the balance after deducting his costs.**

Where in an interpleader suit both the claimants fail to appear, the proper course for the Court is to follow the procedure laid down in the first part of R 4 (1), O. 35, Civil P C., and to declare that the plaintiff is discharged from all liability to the defendants in respect of the money claimed, award him his costs, dismiss him from the suit and direct that after getting his taxed costs he must pay the balance of the money in his hands into Court to the credit of the suit. [P 16 C 1]

The order might further provide that it is to be without prejudice to any claim that the defendants or either of them for payment out of Court, or alternatively that the suit may proceed in the names of one them as plaintiff in place of the original plaintiff or alternatively that an issue be directed to determine the rights of the two defendants inter se. [P 16 C 2]

*M. C. Setalwad*—for Plaintiff.

**Judgment.**—This is a very curious case. It is an interpleader suit brought by the plaintiffs but neither of the two defendants-claimants appears at the trial. Defendant 1 has not entered an appearance at all in the suit. Defendant 2 did appear by a solicitor in the suit but has not appeared at the trial. The question therefore that arises, assuming the plaintiffs make out their case, is what relief the Court ought to grant. The facts very shortly are these: the plaintiffs are commission agents, and in July 1917 they received instructions from defendant 1 by telegram to sell 112 bales of cotton which were being consigned to the plaintiffs through defendant 2. They were also instructed to honour a hundi for Rs. 12,000 which the defendants or one of them were to draw on the plaintiffs. The cotton arrived and was duly sold and the hundi was honoured and paid by the plaintiffs. After doing all that, and after giving credit for the sale proceeds, and after debiting the parties with the hundi, there remains a balance of Rs. 2,558-2 7, which the plaintiffs admit are due from them. Now what has happened is this: that defendant 2 claims that he was really the pledgee of the goods, that he was really the consignor to the plaintiffs, and that as between himself and defendant 1 he ought to receive the balance of the purchase money. A reference to Daniel's Chancery Practice, Vol. II, Edn., 7 p. 1275, shows that interpleader was originally a remedy in the equity Courts and was begun by a bill of interpleader. Subsequently by statute interpleader was extended to the Common law Courts and was later on amplified and is now governed by the Rules of the Supreme Court which will be found in R. S. C. O. 57. Those rules are somewhat to the same effect as the provisions as to interpleader embodied in S. 88 and in Sch. 1, O. 35, Civil P. C.

Mr. Setalvad has not referred me to any of our Bombay High Court rules dealing specifically with interpleader. As far as my recollection goes, I do not think we have any rules modifying what is to be found in the Civil Procedure Code. One knows that interpleader is rather a technical subject, and that it is not always open to the parties to obtain relief by way of interpleader. I have not had the benefit of any argument on the point, but, as far as I can see, the plaintiffs have, according to the practice here, properly taken their proceedings by plaint. Proceedings by originating summons do not appear to be open to them, as would be the case in England. Therefore, as far as I can see, this is a case where, within the meaning of S. 88, two or more persons claim adversely to one another the same debt from the plaintiffs. I think therefore the suit has been properly brought. The evidence in support of it is in order and therefore, as far as the plaintiffs are concerned, I think they have done all they can. Now comes the question, what course I ought to adopt? Turning to O. 35, R. 4, it provides that

At the first hearing the Court may (a): declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit; or (b) if it thinks that, justice or convenience so require, retain all parties until the final disposal of the suit.

There are also certain other alternatives. Under sub-R. (2), if I find that the admission of the parties or other evidence enable me to do so, I may adjudicate the title to the thing claimed. Or again under sub-R. (3) if I find that the admission of the parties do not enable me so to adjudicate, then I may direct issues to be framed and tried, and can proceed to try the suit in the ordinary manner. That is all very well, when there are two claimants before the Court, but in fact I have got neither the one nor the other. I cannot possibly try an action where I have got neither the plaintiff nor the defendant, nor, on the other hand, can I adopt the course of merely dismissing the claim of one or dismissing the claim of the other. There is money in the hands of the plaintiffs which admittedly does not belong to them. Therefore I must make some order which will put matters in trim for the due disposition of this sum and for its custody meanwhile, and which will at the same time give a complete discharge to the present plaintiffs. Mr. Setalvad did refer me to one case of *Eveleigh* v. *Salisbury* (1). It was an interpleader suit and there neither the plaintiff nor the claimant appeared. It was the case of a sheriff having seized certain goods, and there the Court simply directed so much of the goods to be sold as would satisfy the sheriff's charges and directed the sheriff to abandon the rest of the goods. In other words it directed the sheriff to withdraw after realizing his charges. I cannot take that course here, because I cannot put matters in statu quo as was done there. I must make some order as to what is to be done with the moneys in the hands of the plaintiffs.

On the whole I think that the proper course will be to follow strictly the first part of R. 4 (1), O. 35 and to declare that the plaintiffs are discharged from all liability to the defendants in respect of the money claimed, award them their costs and dismiss them from the suit, and treat this as the first hearing. Then I will direct that the plaintiffs after getting their taxed costs must pay the balance of the Rs. 2,558 into Court to the credit of this suit. Then the order will provide that it is to be without prejudice to any claim by the defendants or either of them for payment out of Court, or alternatively that the suit may proceed in the names of one of them as plaintiff in place of the present plaintiffs or alternativeiy that an issue be directed to determine the rights of the two defendants inter se. I think the order may also say, to make it quite clear, that this should be treated as an order at the first hearing under R. 4 (1) (a), O. 35, Civil P. C. Then Mr. Setalvad said he would also like to have an injunction. I do not know that he really requires an injunction, but certainly one of the defendants has threatened the plaintiffs with proceedings, and I think it may properly form part of the order that on payment into Court of the balance the defendants and each of them are to be restrained from taking any further or other proceedings against the plaintiffs in relation to the suit goods or the proceeds of them. I think that really deals with the points. My order will therefore be:

Direct plaintiffs' costs to be taxed and paid out of the Rs. 2,558 in plaintiffs' hands. Direct balance of Rs. 2,558 to be paid to the Accountant-General to the credit of this suit. Declare that on such payment plaintiffs will be discharged from all liability to defendants or either of them in respect of the suit goods or the proceeds thereof, and, direct that thereupon the plaintiffs be discharged from this suit and that defendants and each of them be thenceforth restrained from taking any further or other proceedings against plaintiffs in respect of said goods or the proceeds thereof. This order to be without prejudice to any claim by defendants and either of them for payment out of Court or for the suit to proceed in either of their names as plaintiff or for an issue to be tried. This order to be treated as made on the first hearing under O. 35, R. 4 (1) (a), Civil P. C. Liberty to apply. The draft decree is to be submitted to me before it is passed and entered. Notice of this order is to be given to both claimants, defendants 1 and 2.

G.P./R.K. *Order accordingly.*

(1) [1836] 3 Bing. (n. s.) 298.

## A. I. R. 1919 Bombay 17

SHAH, J.

*on difference between*

HEATON AND HAYWARD, JJ.

*Shankarlal Tapidas*—Appellant.

v.

*Secy. of State*— Respondent.

First Appeal No. 180 of 1915, Decided on 18th December 1918, from decision of Dist. Judge, Broach, in Suit No. 5 of 1914.

**Bombay Summary Settlement Act (7 of 1863)— Grant— Original ruler's grant to mosque continued subject to some quit rent —Stipulation that no enhancement would be made on condition that managers remained loyal—No assessment held could be levied even if the lands passed to stranger and ceased to be mosque property.**

The plaintiff sued to establish a claim to hold certain land partially exempt from land revenue as endowment property of a mosque. He derived his title from a previous purchaser from a previous manager of the mosque. Originally the land was granted for the purposes of the Juma Masjid at Amod by the then Mahomedan ruler of the Province. In 1879 the land was brought under the summary settlement, when an annual quit rent was imposed and a sanad was issued to the manager of the mosque which, after reciting the above fact, provided; "that the said land, subject (in addition to salami or other payments which may have been hitherto levied) to the payment to Government of an annual quit rent of Rs. 17-8-0 only, shall be continued for ever by the British Government as the endowment property of the Juma Masjid at Amod without increase of the said quit rent but on condition that the managers thereof shall continue to be loyal and faithful subjects of the British Government." The defendant pleaded that as the land had practically ceased to be the endowment property of the mosque, it had become liable to full assessment to land revenue. The suit was dismissed and the plaintiff appealed to the High Court:

*Held*: that the settlement in question was governed by the Bombay Summary Settlement Act 7 of 1863, that the terms of the sanad pointed to the conclusion that the land need not continue to be the property of the mosque to enable the holder for the time being obtaining the benefit of the exemption from assessment, and that the Government did not get any right under the sanad to levy the full assessment even when the property ceased to be the endowment property otherwise than by a lawful alienation.

[P 22 C 2, P 23 C 1]

*S. Y. Abhyanka*—for Appellant.

*S. S. Patkar*—for Respondent.

FACTS appear from the following udgment, dated 14th August 1908.

**Heaton, J.**—The plaintiff, a Hindu is the holder of certain lands which were once the endowment property of the Juma Masjid at Amod, and he claims to hold these lands at a quit rent much less than the full assessment on the lands. The Collector, presumably because he found that the lands had in fact ceased to be the endowment property of the mosque, levied the full assessment from the plaintiff. The latter being aggrieved sued to recover the excess moneys levied and for an injunction restraining the Collector from levying in the future more than the quit rent stated in the sanad conferring the lands as endowment property. His suit was dismissed and he has appealed to this Court. The question involved is a very easy one to state, a difficult one to answer. Is the Collector right in levying the full assessment? The land in question is cultivable assessed land. To go back to first principles: the land is liable to pay land revenue, for this is provided by S. 45, Land Revenue Code. The assessment for land revenue has been fixed and having been fixed "it shall be levied," for that is the law laid down by S. 100, Land Revenue Code. There are, of course, exceptions to the general propositions comprised in Ss. 45 and 100; but the only exception which has any application here is that stated in S. 52, Land Revenue Code. It is provided by S. 100 that;

"in fixing the assessment regard shall be had to the requirements of the proviso to S. 52."

The proviso to S. 52 runs as follows:

"Provided that in the case of lands partially exempt from land revenue, or the liability of which to payment of land revenue is subject to special conditions or restrictions, respect shall be had in the fixing of the assessment and the levy of the revenue to all rights legally subsisting, according to the nature of the said rights."

As the result of prolonged argument the conclusion reached was this, that the question now is whether the plaintiff has a legal right to hold the lands subject only to the payment of assessment as stated in the sanad. If he has, then the case falls within the proviso to S. 52 and that legal right must be respected in levying the assessment. It is, of course, for the plaintiff to show that he has this legal right. He seeks to do this in two ways, first; by putting the sanad before the Court and contending that the sanad gives the legal right in question to whomsoever thereafter is owner of the lands. Secondly, he seeks to do it in virtue of the sanad together with proof that he is the lawful owner of the lands and holds them according to the purpose of the sanad. Undoubtedly the plaintiff is the holder of the lands and I will as-

sume that he is now the lawful owner, for he claims that he has become the owner and on the evidence adduced we must take it as between the plaintiff and the defendant that the former has acquired a lawful title, at least by adverse possession if in no other way. We are not here concerned with the question whether a suit could be brought on behalf of the mosque to recover the land. I will deal with the second part of the proposition, that being the lawful owner of the lands the plaintiff is entitled to hold them at the assessment stated in the sanad, because he holds them according to or at least not contrary to the purpose of the sanad. I will not discuss the evidence, it is fairly set out by the District Judge in his judgment. It does not suggest in any way that the plaintiff is the proper and lawful alienee of the endowment lands. If he were, it may be that he would have an irresistible case. As a fact the plaintiff in all probability holds as a spoliator of the endowment or as the successor of such a person.

The original alienation must have been in all probability a wrongful alienation or in other words, a breach of trust and the alienee must have been a spoliator. for alienations of this kind, as is notorious, are commonly improper. This, of course, is not certain, it is only a probability but, in my opinion, it operates as a certainty against the plaintiff in this case, for he has to establish the facts he relies on and the evidence he himself has adduced suggests an improper, not a lawful, alienation of the endowment property away from the mosque. The plaintiff, therefore, fails to show that the alienation by which he has ultimately become the owner of the lands was in accordance with the purpose of the endowment. It is a fact therefore in this case that the purpose of the endowment has been defeated. As the plaintiff is a lawful holder of the lands but holds them contrary to the purpose of the endowment, he cannot claim that he holds according to the purpose of the sanad: for the purpose of the sanad is in this matter identical with the purpose of the endowment, unless I am wrong in my opinion as to the first line of plaintiff's argument. As he holds contrary to the purpose of the sanad, he cannot conceivably take the benefit of the sanad unless that sanad irrevocably deprives Government of the right to levy the full assessment from whomsoever thereafter may be the owner of the lands. Thus we are led to the first part of the two-headed proposition urged by the plaintiff. The sanad runs as follows:

"By Act 7 of 1863 of the Bombay Legislative Council . . . is hereby declared that the said land subject (in addition to salami or other payments which may have hitherto been levied) to the payment to Government of an annual quit rent of Rs. 17-8-0 (seventeen and annas eight only), shall be continued for ever by the British Government as the endowment property of the Juma Musjid at Amod, Taluka Amod, zilla Broach, without increase of the said quit rent, but on the condition that the managers thereof shall continue loyal and faithful subjects of the British Government."

What is stated is that the property is to continue for ever as the endowment property of the masjid. But in fact the property has ceased to be the endowment property of the masjid. This is a contingency not expressly provided for. Is it impliedly provided for? The sanad was issued under Bombay Act 7 of 1863 and was, to put it briefly, the outcome of an arrangement between the Government and the manager of the mosque. According to this arrangement the lands were to be continued for ever to the mosque on payment annually of the stated assessment and no further proof of title was to be required from the manager on behalf of the mosque. The purpose of the arrangement was to secure the lands in perpetuity as the endowment of the mosque. No power to alienate is conferred and there is no grant to "heirs and assigns". There could not properly be either in such a case as this, for either would be in my opinion wholly inappropriate. It should therefore imply that as soon as the purpose of the arrangement failed the arrangement was at an end. The point is no doubt one as to which difference of opinion is almost inevitable and I find it very difficult to formulate my reasons convincingly, though my opinion is firmly established. My reasons, reduced to their briefest and simplest form are these: the sanad is intended to be a plain document for plain unlearned men, it is not an elaborate legal document. Its purpose, as would be thoroughly well understood, was at least this: (1) to secure the lands in perpetuity as a mosque endowment; (2) to fix an assessment in perpetuity; and

(3) to secure the holder of the sanad from any interference at the hands of Government so long as the agreed assessment was paid. What would a plain unlegal man say was to happen when the lands granted as religious endowment ceased to be endowment lands? He would, as I think, say without hesitation that as soon as the lands ceased to be endowment lands, the right to hold them at a reduced assessment would cease also. He would I think imply this from the words of the sanad and the circumstances in which it was given.

It is probable that by treating the sanad as a legal document to be construed (or it may be camouflaged) by the rules of English real property law, the contrary result would be reached. That however is a probability I feel ought not to influence me: we are dealing with Indian not with English property and with Indian not an English document. It was argued that the plaintiff could succeed in virtue of S. 7, Act 7 of 1863 as his predecessor-in-title was the rightful owner at the time of the settlement. That however is not proved, and the evidence suggests the extreme improbability of such a thing. It seems indeed obvious to me that the alienee would not be the rightful owner at the date of the settlement for the purpose of that settlement; for his ownership, as he was a Hindu not connected with the mosque would be incompatible with the purpose, of such a settlement. It was also suggested that the sanad must be taken to be of the kind contemplated by S. 6, Bombay Act 7 of 1863, and that therefore it must be taken to have contemplated the right to transfer and also the rights of assigns. But in fact the sanad did not do this and it seems to me that having regard to the general law as to religious endowments, the sanad could not properly contemplate and imply unrestricted powers of alienation. It was again suggested that the words "it shall be lawful for the Governor-in-Council, etc.," in S. 2, Bombay Act 7 of 1863, mean that the Governor-in-Council must, etc. If that be so, then undoubtedly the sanad must be taken to

"guarantee the continuance in perpetuity of the said lands to the said holders, their heirs and assigns upon the said terms;"

and the plaintiff would be entitled to succeed. Now as is well known, the English words "it shall be lawful" naturally imply the same thing as the word "may" and not the same thing as the word "must." It is only in particular circumstances that those words are given the "legal twist" which changes their meaning from the normal to the peculiar. I do not think such circumstances exist here. Therefore I think we must take the Sanad, as I have said, as a plain document intended for plain men. So taking it, I gather from it an implied provision that the privilege of the lesser assessment will cease when the property ceases to be the endowment property of the mosque, unless of course it can be shown that the alienation was a lawful alienation. This has not been shown. Therefore I would dismiss the appeal with costs. As however my learned brother and myself are unfortunately not agreed, our order in the matter must be held over until the decision of the Full Bench in *Bhuta Joyatsing* v. *Lakadu Dhansing* (1) is made known. We are not in agreement in two matters. On the pleadings my learned brother thinks that it must be presumed that the alienation by which the plaintiff's predecessor-in-title became the holder of the lands was a lawful alienation. I do not think so. The plaintiff in para. 4 of his plaint alleged:

"The plaint property was bought by the ancestors of Patel Punjabhai Ramdas of Amod more than 60 years back and since then continued in their independent possession and use. Pujabhai Ramdas passed a Sanad deed of the property in Samvat 1953, Vaisak Sud 10th, in my favour, and in Samvat 1962, Maha Vad 12th, the same is sold off to me. Since then the property has continued in my independent possession and use."

The defendant in para. 3 of his written statement replied:

"The property in suit was Dewasthan land and the plaintiff and his predecessors-in-title have purchased it with knowledge of the nature of the land and the consequent liability of the grantee to apply the income to religious purposes."

I do not read these pleadings as containing an assertion by the plaintiff that he held under a lawful alienation, still less as containing an admission by the defendant that it was so. The second matter as to which we differ is, whether the sanad is to be read or not as implying a condition. Therefore the points of law to be considered are: (1) Is it to be taken as implied by the pleadings in the case that the plaintiff's predecessor-

(1) [1919] 50 I. C. 715 (F. B.).

in-title became the holder of the lands by a lawful alienation? (2) If not, then, as a matter of law, does the sanad imply the following condition: that if the lands cease to be the endowment property of the mosque otherwise than by a lawful alienation, the Government may levy the full assessment on the lands?

**Hayward, J.**—The plaintiff Bania sued to establish his claim to hold certain land partially exempt from land revenue as endowment property of a mosque. He derived his title from a previous purchaser from a previous manager of the mosque. He did not join the present manager as a party and his title as against the mosque was not disputed by the defendant Secretary of State. But it was pleaded that as the land had practically ceased to be the endowment property of the mosque, it had become liable to full assessment to land revenue as directed by the Collector on behalf of the Secretary of State. It was inter alia argued at the trial that this was "tantamount to a resumption of the grant" and was not justified by the terms of the sanad granted to the manager of the mosque by the Collector on behalf of the Secretary of State under the Summary Settlement Act 7 of 1863. This argument was rejected by the District Judge, but has been repeated before us in first appeal and would appear to raise the real issue between the parties for determination by this Court. Now the plaintiff's title has not been disputed in the pleadings as against the mosque. It might indeed be disputed in other proceedings between him and the manager, but it must, in my opinion, be presumed for the purpose of these proceedings to be a good title as against the mosque. The only issue to be decided would therefore appear to be whether the transfer of the land by the previous manager of the mosque has rendered it liable to full assessment to land revenue by the Collector on behalf of the Secretary of State. It appears to me that the decision of that issue depends on the true interpretation of the terms of the sanad granted to the previous manager of the mosque under the Summary Settlement Act 7 of 1863. The relevant terms are:

> "The said land ..... shall be continued for ever ..... without increase of the annual quit rent ..... as the endowment property of the mosque."

The sanad was granted in 1879 by the Collector on behalf of the Secretary of State. The plain meaning of those terms, in my opinion, is that the land, with its exemption from full assessment to land revenue, was granted to the manager not as his private property but as the public property of the mosque. The property granted was the land with its exemption and the manager was not to deal with it as his private property but was to hold it for the benefit of the public entitled to use the mosque. He was to hold it subject to the rules of Mahomedan law relating to mosques. It was not intended, in my judgment, to distinguish between the land and its exemption or to render the exemption liable to resumption upon the transfer of the property. If this had been intended, it would not have been left to implication, but there would have been express provision. It was not in fact, in my judgment, intended to restrict the lawful powers of the manager to transfer the property for justifying necssity under the Mahomedan Law, nor to protect the property against unlawful transfers by reserving special powers of resumption, over and above the ordinary remedies available to the public entitled to use the mosque, to the Collector on behalf of the Secretary of State. It appears to me further that this is the true interpretation of the terms of the sanad, not only according to the plain meaning of the terms used, but also according to the authority for its grant given by the Legislature. It was provided that it should be lawful in respect of lands brought under the summary settlement to "guarantee by sanad the continuance in perpetuity of the said lands to the said holders, their heirs and assigns" by S. 2 (1) and that the said lands should be the

> "transferable property of the said holders, their heirs and assigns without restriction as to.... transfer continued in perpetuity subject to a fixed annual payment....at the rate of two annas per each rupee of the assessment"

by S. 6, Summary Settlement Act 7 of 1863. There was therefore express prohibition against restriction of the rights of transfer and against the imposition of full assessment on lands brought under the Summary Settlement Act. It was not intended to distinguish lands held on behalf of religious institutions, because the special provisions of S. 38 (2), Regulation 17 of 1827, were repealed by and

those of S. 8 (3), Summary Settlement Act 2, were not repeated in Act 7 of 1863. It would further appear immaterial whether the transfer was effected after or before the grant of the sanad. If after, the transferee could claim immediately under the sanad: if before, he could claim the benefits of it as the rightful owner under the provisions of S. 7, Summary Settlement Act 7 of 1863. It would not be possible to levy full assessment under the general law relating to land revenue, as rights legally subsisting have been specially protected by the proviso to S. 52 referred to in S. 100, Land Revenue Code, 1879. It should finally be observed that the right of resumption in respect of lands granted for religious purposes under the general law relating to land revenue has been reserved not merely by implication but in express words in the Form Appendix K to R. 13 of the rules under S. 214, Land Revenue Code, 1879, and such express reservation has been given legal sanction under the Crown Grants Act 15 of 1895. It appears to me therefore both on the plain meaning of the terms of the sanad and on the law relating to its grant that no power of resumption has been reserved to the Collector on behalf of the Secretary of State. If that view should be correct, then there ought to have been a decree for the recovery of Rs. 33-12 0, the express assessment levied for two years by the Collector—the recovery of the excess levied for the third year having been time barred—with costs against the Secretary of State; but as that view has the misfortune to differ from that held by my learned brother, the matter must be reserved for decision according to the rule shortly to be laid down by the Full Bench of this Court.

**Shah, J.**—In consequence of the difference of opinion between Heaton and Hayward, JJ., who heard this appeal, it has been referred to me under S. 98, Civil P. C. in accordance with the conclusion arrived at by the Full Bench in *Bhuta Jayatsing* v. *Lakadu Dhansing* (1) as to the procedure to be followed in such cases. The points of law upon which they differ have been stated thus:

"(1) Is it to be taken as implied by the pleadings in the case that the plaintiff's predecessor in-title became the holder of the lands by a lawful alienation? (2) If not, then, as a matter of law, does the sanad imply the following condition: that if the lands cease to be the endowment property of the mosque otherwise than by a lawful alienation, the Government may levy the full assessment on the lands?"

As to the first question it is not disputed before me, and both the differing judgments proceed on the hypothesis, that for the purpose of this suit the plaintiff must be taken to have acquired a lawful title to the land in suit, quite apart from the question whether the original alienation in favour of the ancestor of the plaintiff's predecessor-in-title was lawful or not. I am not concerned in this litigation with the question whether the manager of the mosque has now any right to the land in suit against the plaintiff: and I express no opinion whatever on that question. The plaintiff must be taken in this suit to have acquired a lawful title to the land. The question, whether the original alienation in favour of the ancestor of Punjabhai, who mortgaged the land in 1897 and subsequently sold it in 1906 to the present plaintiff, was lawful or not stands on a different footing. The plaint refers to this alienation in favour of Punjabhai's ancestor more than 60 years ago : and in the written statement it is pleaded that the land in suit is Devasthan land and the plaintiff and his predecessor-in-title have purchased it with knowledge of the nature of the land and the consequent liability of the grantee to apply the income to religious purposes.

It is difficult to say that the defendant questioned the validity of the alienation referred to in the plaint : and it is urged for the appellant that the defendant did not care to put the plaintiff to the proof of the propriety and validity of an alienation, which took place many years ago. It is urged that the existence of a local custom in this District of Broach in favour of an alienation of wakf property is recognized by Westropp, C. J., in *Abas Ali* v. *Ghulam Muhammad* (2) and that in *Narayan* v. *Chintaman* (3) the learned Chief Justice, while referring to the inalienability of religious endowments, whether Hindu or Muhammadan, recognizes certain exceptions, including the exception based on the local custom referred to. Further it cannot be said that according to Mahomedan law the wakf property can never be validly alienated.

(2) [1862-65] 1 B. H. C. R. 36.
(3) [1880] 5 Bom. 393.

Under these circumstances I think that on the pleadings the alienation in favour of Punjabhai's ancestor may be properly taken to be lawful. This point however has no practical importance, having regard to the view which I take of the second question : and I should hesitate to base my decision on such an implication from the pleadings. If the ultimate decision depended in any way on this point I might have considered the suggestion that in the interests of justice it would be proper to send down an issue on the point, to allow the parties an opportunity of adducing evidence thereon, and to decide the question on proper materials instead of basing an inference in favour of the plaintiff on the pleadings. Assuming however that the alienation in favour of the plaintiff's predecessor-in-title was unlawful, as the second question assumes, is the defendant entitled to levy full assessment on the land ? The answer to this question depends upon the construction of the sanad. The sanad was issued in 1879 to the manager of the mosque. The land in suit was brought under the summary settlement authorized by Act 7 of 1863. After reciting that fact, the sanad provides :

" That the said land, subject (in addition to salami or other payments which may have been hitherto levied) to the payment to Government of an annual quit rent of Rs. 17-8-0 only, shall be continued for ever by the British Government as the endowment property of the Juma Masjid at Amod without increase of the said quit rent, but on the condition that the managers thereof shall continue to be loyal and faithful subjects of the British Government."

It is not suggested in the present case that the condition that the managers of the mosque shall continue to be faithful and loyal subjects of the British Government is not fulfilled. The right to levy the full assessment is claimed for the Government on the ground that the land has ceased to be the property of the mosque. It is contended that the condition that the grant shall continue only so long as the land shall continne to be the property of the mosque is implied by the terms of the sanad and that the absence of the words " heirs and assigns " is consistent only with that view. The learned Government Pleader contended that even if the original alienation by the manager in favour of Punjabhai's ancestor were lawful, the Government would still have the right to resume the grant in case the land ceased to be the property of the mosque. For the plaintiff it is urged that the sanad is in the usual form adopted in the case of a settlement relating to any religious endowment, that the absence of the words " heirs and assigns " is not inappropriate in such a case, and that according to the provisions and the scheme of the Summary Settlement Act (Bombay Act 7 of 1863), which applies to the present settlement, and according to the terms of the sanad no such condition as is suggested by the defendant can be implied. It is urged that so long as the quit rent is paid and so long as the managers continue to be faithful and loyal subjects, the Government have agreed to continue the land in perpetuity as the endowment property, whether it continues to be the property of the mosque or is transferred validly or invalidly to third parties.

After a careful consideration of the arguments urged on both sides, I am of opinion that no such condition as is stated in the question is implied by the terms of the sanad, and that the Government have no right to levy the full assessment, as they have done. In the first place the land is expressly brought under the summary settlement authorized by Bombay Act 7 of 1863. This indicates to my mind that the nature of the settlement is such as is authorized by S. 2 of the Act. The section is general and would apply to all lands, including the endowment lands. The sanad does not in terms refer to S. 2; but the expression summary settlement authorized by Act 7 of 1863 can properly refer only to such settlement as is authorized by the section. It is contendad by the Government pleader that the sanad may be the result of an inquiry and a decision contemplated by the Act and he refers to Ss. 14, 19, 20, 21 and 22 of the Act. In the first place, the record of the case does not disclose any basis for the suggestion that there was a decision and that the sanad was based upon such a decision. Secondly it is contrary to the terms of the sanad, as ordinarily the settlement based upon an inquiry and a decision would not be the summary settlement authorized by the Act. It would be a settlement which would represent the terms of the old grant, based upon the proof of such grant.

Further, the words of grant in the sanad read in their plaint and natural sense show that, so far as the Government are concerned, the property shall for ever be continued as the endowment property of the mosque. It would not be reasonable to imply such a condition as is now suggested by the Government from these words. If the Government wanted to impose such a condition it should have been stated, instead of leaving it to be implied in this manner. I do not think that it could be implied without unduly straining the words or without reading words in the sanad which are not there. The infirmity of this contention is exposed, in my opinion, by the fact that it necessarily involves the result that the Government could levy full assessment, even if the property be alienated by the managers of the mosque for a proper purpose in a proper manner. No doubt the Government Pleader has contended that that is the true view. But I feel sure from the judgment of Heaton, J., that he would disallow such a contention, for he observes that if the plaintiff were a proper and lawful alienee of the endowment lands he would have an irresistible case. Therefore it is that the point of difference has been limited to a case where the property ceases to be endowment property otherwise than by a lawful alienation. I have no hesitation in disallowing the contention that under the terms of the sanad the Government have the right to resume the grant or to levy full assessment when the property is validly and properly alienated by the managers of the mosque. This affords a reason for not importing such a condition in the sanad at all even when the property ceases to be the endowment property otherwise than by a lawful alienation.

The omission of the words "heirs and assigns" does not present any insuperable difficulty to my mind. In the case of endowment lands these words are probably considered unnecessary or inappropriate, when the nature of the settlement is indicated in clear words by reference to Act 7 of 1863. But whatever the reason of the omission may be, I do not think that the omission can justify the importing of a condition, which is not expressed and which seems to be inconsistent with the provisions of the Act. The purpose of the Act is clearly stated in the preamble and S. 2 authorizes the continuance in perpetuity of the land to the holders, their heirs and assigns, upon certain terms and conditions. S. 6 provides that the property shall be heritable and transferable: it may be that in virtue of the special limitations of the particular holder it may not be heritable or transferable in the ordinary sense; but so far as the Government are concerned, it would be heritable and transferable. S. 7 provides also that any settlement made by the Governor in-Council with the holder of any land will be binding upon the rightful owner, his heirs and assigns whoever such rightful owner may be. These provisions apply to the summary settlement authorized by the Act, and in my opinion they apply even when the settlement is in respect of the endowment lands. The importing of the condition now suggested would be inconsistent with these provisions. This view is also supported by the omission in Act 7 of 1863 of the provisions corresponding to S. 38, Cl. 2, Regn. 17 of 1827, and S. 8, Bombay Act 2 of 1863. Act 7 of 1863, which repealed S. 38 of the Regulation of 1827, and Act 2 of 1863 were passed about the same time. Both the Acts have been framed with similar objects in view and the absence of any provisions in Act 7 of 1863 corresponding to S. 8, Act 2 of 1863 is not without significance. In *Krishnarao Ganesh* v. *Rangrao* (4) Westropp, C.J., observes with reference to this omission as follows:

"That Bombay Act 7 of 1863 contains no similar provision may possibly be due to the fact that in some few places in the territories to which it applies, e. g., Broach and Surat, it seems that by local custom contrary to the general law, lands held for Mahomedan religious purposes have been treated as alienable."

The provisions of the Act, which must be taken to govern the settlement in question, and the terms of the sanad point to the conclusion that the condition that the land must continue to be the property of the mosque in order that the holder for the time being may have the benefit of the exemption from assessment allowed by the sanad, cannot be implied and that the Government do not get any right under the sanad to levy the full assessment even when the property ceases to be the endowment property otherwise than by a lawful alienation.

(4) [1866] 4 B. H. C. R. (o. c. j.) 1.

The argument that the Government could not have intended to continue the grant even when the purpose of the grant is defeated has not force in view of the provisions of the Act. In every case the purpose of the grant is defeated in a sense, when a trespasser becomes the holder by adverse possession and deprives the rightful holder of his property. In the case of the endowment property the purpose is more glaringly defeated when a stranger comes in otherwise than by a lawful alienation. The true view seems to me to be that when any land is brought under the summary settlement authorized by Act 7 of 1863, the right of the Government to the quit rent fixed in the sanad in accordance with the provisions of the Act and the right of the lawful holder for the time being to the exemption allowed under the summary settlement are fixed in perpetuity subject, of course, to the conditions expressly mentioned in the sanad, without any reference to the question whether the land continues to be the property of the original grantee or not. It is for the manager of the religious institution to take care of the endowment property, as it is for an individual to take care of his private property; and the negligence or the misconduct of the manager cannot benefit the Government under the provisions of the Act and the terms of the sanad.

I therefore agree with my brother Hayward on the second question. The result is that the decree of the lower Court is reversed, and there will be a decree for the plaintiff for Rs. 33-12-0 with costs throughout on the defendant.

G.P./R.K. *Decree reversed.*

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## * A. I. R. 1919 Bombay 24

SCOTT, C. J. AND HAYWARD, J.

*Gopalji Kuverji*—Appellant.

v.

*Morarji Jeram Naranji* and *another*—Respondents.

Original Appeal No. 24 of 1918, Decided on 16th January 1919.

*** (a) Arbitration Act (9 of 1899), Ss. 8, 9 and 19—Reference to three arbitrators—All, after acting, refusing to proceed further—Court has no jurisdiction to appoint new arbitrators in their place.**

In a case of a submission of a dispute to three named arbitrators, all of whom after acting have declined to proceed any further, the Court has no jurisdiction to appoint new arbitrators in place of those who have refused to act. [P 26 C 2]

**(b) Arbitration Act (9 of 1899), S. 8 (1) (b)—Application—S. 8 (1) (b) does not apply to a case of independent appointment of two arbitrators—S. 8 (1) (b) only applies to certain cases of failure to appoint jointly—Cl. (b) of S. 8 must be read with Cl. (a) and Cl. (d) with Cl. (c)**

Per *Scott, C. J.*—S. 8 (1) (b) does not apply to the case of independent appointments of two arbitrators. In such a case where a vacancy occurs it would ordinarily be filled by the original appointor as contemplated by S. 9 of the Act. S. 8 (1) (b) only applies in terms to a single vacancy to be supplied by the parties. The section nowhere contemplates the case of two original arbitrators appointed jointly by the parties plus a third of the same class appointed by the two already jointly appointed or by the parties. The section only applies to certain cases of failure to appoint jointly. Cl. (b) of the section must be read with Cl. (a) and Cl. (d) with Cl. (c). [P 26 C 1]

**(c) Arbitration Act (9 of 1899), Ss. 8, 9 and 19—Selection by submission reserved for one of two disputing parties—Court cannot select.**

The Court is not at liberty to take upon itself to select an individual where the selection is by the submission reserved for one of two disputing parties. [P 26 C 1]

**(d) Arbitration Act (9 of 1899)—Act is intended to amend law relating to arbitration—It does not deal with whole of law of arbitration—It must be strictly construed.**

Per *Hayward, J.*—The Arbitration Act is an Act to amend the law relating to arbitration. It does not deal with the whole law of arbitration and it must be construed strictly in that it confers special powers of interference not otherwise inherent in the Court. [P 26 C 2]

**(e) Arbitration Act (9 of 1899) — Act primarily applies to certain ordinary commercial contracts— Court cannot extend special jurisdiction to special contracts not contemplated by Act.**

The Arbitration Act applies primarily to ordinary commercial contracts in which the reference is to a single arbitrator or else to two arbitrators, one appointed by each party, with power to call in a third arbitrator or leave the decision to an umpire. It is not open to the Court to extend this special jurisdiction to special contracts not clearly contemplated or expressly mentioned by the Act.

Therefore it is not open to the Court to appoint an arbitrator or arbitrators in a case where the reference is to more than two arbitrators and the parties fail to nominate the arbitrators or the arbitrators fail to proceed with the arbitration. [P 26 C 2 P 27 C 1]

*Taraporevalla*—for Appellant.

*Kanga* and *Desai*—for Respondents.

**Scott, C. J.**—The petitioner Morarji Jairam Naranji petitions under the Indian Arbitration Act as follows:

"1. That by a writing in the Gujarati language and character made in Bombay on the 21st March 1918 between respondent 1 of the first part, the petitioner of the second part, and respon-

dent 2, Pitamber Vithalji, of the third part, certain disputes between the said parties in respect of contracts for sales and purchases of piecegoods of ready and forward delivery were referred to the joint arbitration of Messrs. Lalji Govindji, Morarji Mathurdas Kamdar (a solicitor of this Hon'ble Court and Solicitor for respondent 1) and Mansukhlal Oghadlal upon and subject to the terms and conditions mentioned in the said writing. By the said writing it was provided that the said arbitrators should publish their award within two months, and power was given to the said arbitrators to further extend the said time by one or two months. A copy of the said writing is hereto annexed and marked A. 2. The said arbitrators entered upon the said references and, after partly proceeding with the reference, they, by their letter of 12th April 1918, addressed to the aforesaid parties to the said reference, informed them that they declined to continue to act further as arbitrators. A copy of the said letter is hereto annexed and marked B.

3. There-upon the petitioner by his attorneys' letter, dated the 24th April 1918, addressed to the respondents, informed them that under the events that had happened the petitioner was entitled to have three arbitrators appointed in place of the said three originally appointed arbitrators under the provisions of S. 8 of the above Act, an suggested the name of the said Mr. Mansukhlal Oghadlal (whom he had induced to act again as arbitrator) as one of the said newly to be appointed arbitrators and called upon them to concur in his appointment and to suggest the names of two other persons as arbitrators within seven clear days after the service of the said letter. A copy of the said letter is hereto annexed and marked C and the office translation of the consent in writing of the said Mr. Mansukhlal Oghadlal to again act as arbitrator, dated 15th May 1918, is hereto annexed and marked D. 4. In reply to the said letter respondent 2, Pitamber Vithalji, by his attorneys' letter dated 14th May 1918, addressed to the petitioner's attorneys, informed them that their client had again appointed the said Mr. Lalji Govindji as one of the arbitrators and that the said arbitrator, Mr. Lalji Govindji, had no objection to continue as arbitrator. Copy of correspondence between the petitioner's attorneys and the attorneys of the said Pitamber Vithalji is hereto annexed and marked E. 5. Respondent 1 has in his attorneys' letter, dated 25th April 1918, addressed to the attorneys of the petitioner, stated that all the three arbitrators having refused to act, the petitioner was not entitled to make any fresh appointment and to call upon respondent 1 to concur in such appointment and to suggest the names of two other arbitrators, and respondent 1 declined to do so. A copy of the said letter is hereto annexed and marked F."

The prayer is to the Court: (1) to confirm the appointment of Mansukhlal Oghadlal and Lalji Govindji as arbitrators and appoint a third arbitrator and to make an order directing such three arbitrators or only the two abovenamed to proceed with the reference from the stage where the originally appointed arbitrators left it; or (2) alternatively to appoint three arbitrators to proceed with the reference.

It was objected by Gopalji Kuverji that the Arbitration Act did not confer upon the Court jurisdiction to make any such order in-the circumstances of the case. Marten, J., before whom the case came in Chambers, held that S. 8 of the Act did give him jurisdiction, and acting upon a subsequent consent of the parties he appointed a single and entirely new arbitrator to dispose of the reference.

The reasoning by which the learned Judge arrived at his decision was as follows:

"Section 8 (c) contemplates the case of two arbitrators plus an umpire or third arbitrator. As power is given to supply a vacancy caused by the death of the third arbitrator, one would expect a provision to supply a vacancy or vacancies caused by the death of the two first arbitrators. Sub-S. (b), if read liberally, would furnish such provision and if so, it would equally apply to the supply of vacancies caused by the death, refusal, etc., of three arbitrators."

But is it correct to hold that Cl. (b) is meant to cover the case of arbitrators 1 and 2 where the appointment of arbitrator No. 3 falls under Cl. (c) and (d)? I think not; because arbitrator No. 3 in the cases supposed in (c) and (d) is in a special category like an umpire appointed jointly by the parties, or by arbitrators Nos. 1 and 2, each of whom

is appointed by one of the parties independently of the other. S. 8 (1) (b) does not apply to the case of independent appointments of two arbitrators. In such case, when a vacancy occurs, it would ordinarily be filled by the original appointer, as contemplated in S. 9. S. 8 (1) (b) only applies in terms to a single vacancy to be supplied by the parties. S. 8 nowhere seems to contemplate the case of two original arbitrators appointed jointly by the parties plus a third of the same class appointed by the two already jointly appointed by the parties. In short S. 8 only applies to certain cases of failure to appoint jointly. Where choosers should but do not concur, the Court is enabled to assist them by the selection and appointment of an individual falling in one of the following categories an (i. e. one) arbitrator; an umpire; a third arbitrator in the special sense in which the term is used. It follows that, in my opinion, Cl. (b) must be read with Cl. (a), and Cl. (d) with Cl. (c), S. 8. The Court is not at liberty to take upon itself to select an individual where the selection is by the submission reserved for one of two disputing parties.

The Act does not attempt to provide for every case. It only gives assistance in the commoner cases where joint appointment cannot be arrived at. It is said that the present case is one of joint appointment of three arbitrators. That is probably correct, but it is not one of the common cases of joint appointment contemplated by the section. It is unusual, except perhaps in references in the course of a suit, to have a triangular submission and the joint appointment of three. In Russell on Awards, Part II, Ch. III, S. 3, in the editions of 1870, 1882 and 1906, it is said:

"In case of the death, refusal to act, or incapacity, of a single arbitrator .... a Judge may appoint a new one if the parties do not; and .... where one of two arbitrators fails for the like causes, unless the party appointing him appoints a fresh arbitrator, the remaining arbitrator may be appointed to act alone."

The authority given for this statement is until 1889 the Common Law Procedure Act, 1854, Ss. 12 and 13, and after that date the Arbitration Act, Ss. 5 and 6 (Ss. 8 and 9 of the Indian Act), which reproduced Ss. 12 and 13 of the Act of 1854. This, as the pronouncement of the standard text-book on arbitration unaltered through a period of 35 years, is a good indication of the understanding of the profession as to the scope of these sections. The dicta of Lindley, L. J. and A. L. Smith, L. J. in *In re Smith & Service* and *Nelson & Sons* (1) and *Manchester Ship Canal Co.* v. *S. Pearson* and *Son, Limited* (2) respectively show that those learned Judges understood the provisions in question in the same sense. In my opinion therefore the Court had no jurisdiction to make the order that it did, and the appeal must therefore succeed upon that ground. The appeal is allowed, and the decree is set aside and the petition dismissed with costs throughout upon the petitioner.

**Hayward, J.**—The appeal involves a point of importance. The Arbitration Act applies to the appointment of a single arbitrator and in certain cases to the appointment of two arbitrators. Does it apply in any case to the appointment of three arbitrators? It is important to remember in resolving this point that the Act is an Act to amend the law relating to arbitration. It does not deal with the whole law of arbitration and it must be construed strictly, in that it confers special powers of interference not otherwise inherent in the Court. It appears to me, with this in mind, that it applies primarily to the ordinary commercial contracts in which the reference is to a single arbitrator or else to two arbitrators, one appointed by each party, with power to call in a third arbitrator or leave the decision to an umpire. Such are the references treated in Ss. 1 and 2 and at p. 202 in S. 3, Ch. 4 of Russell on Arbitration, Edn. 4 of 1870. This application is indicated by S. 6, which provides that a submission shall be deemed ordinarily to be to a single arbitrator and that if the reference is to two arbitrators they shall have power to appoint an umpire; while S. 8 (1) (a) and (b) proceeds to provide for the failure of the parties to nominate the single arbitrator or the failure of the nominated arbitrator to proceed with the arbitration, and S. 9 for the failure of either of the parties to nominate either of the two arbitrators or the failure of either of the nominated arbitrators to proceed with the arbitration, while provision has already been made in S. 8 (1) (c) and (d) for the failure

(1) [1890] 25 Q. B. D. 545.
(2) [1900] 2 Q. B. 606.

of the parties or the two arbitrators to nominate the third arbitrator or the umpire. It has been provided that the arbitration shall in all these cases be made effective, if necessary, by the special interference of the Court. These provisions of the Arbitration Act reproduce verbatim the English Statute, 1889.

It is not, in my opinion, open to us to extend this special jurisdiction to special contracts not clearly contemplated and expressly mentioned by the Act. Thus it is not open to us to interfere where the reference is to two arbitrators to be appointed, not one by each party, but the two jointly by the two parties. There is no provision in S. 8 for interference on the failure of the parties jointly to nominate the two arbitrators. Nor do Cls. (a) and (b) read together provide for interference on the failure of two arbitrators so nominated to proceed with the arbitration. These two clauses must, in my opinion, be read together and the words "the appointment of an arbitrator" at the end of Cl. (a) read as repeated in the words "if an appointed arbitrator" at the opening of Cl. (b), just as the two clauses (c) and (d) have also plainly to be read together. It would, in my opinion, be repugnant to the arrangement and plain meaning of S. 8, Arbitration Act, to give effect to the general provisions of S. 13, General Clauses Act.

It is similarly, in my opinion, not open to us to interfere where the reference is to more than two arbitrators and the parties fail to nominate the arbitrator or the arbitrator fail to proceed with the arbitration. There is no provision in S. 8, Cls. (c) and (d), providing for a difference of opinion between two arbitrators and settlement by a third arbitrator or by an umpire.

Such references are thus treated at p. 203, S. 3, Ch. 4 of Russell on Arbitration, Edn. 4 of 1870:

"The arbitrators selected, one by each side, ought not to consider themselves the agents or advocates of the party who appoints them . . . . In order to ensure a decision in case of difference of opinion, the submission frequently goes on to prescribe that the two arbitrators shall name a third and that an award made by any two, if they cannot all agree, shall be sufficient. If the two arbitrators do not appoint a third arbitrator or an umpire, when at liberty to do so, a Judge . . may appoint . . ."

Russell proceeds to distinguish the duty of a third arbitrator from that of an umpire:

"The arbitrators named by the parties often seem to think that they are to represent their respective nominors and act rather as advocates than Judges, while the third arbitrator frequently supposes he is an umpire and that his active interference is not to commence until the others have differed finally . . ."

And at p. 211, S. 4:

"Where two arbitrators are appointed, the submission often provides that in case of their not agreeing in award, the matters shall be decided by a third person, who is styled an umpire."

Clauses (c) and (d), S. 8, do not, in my opinion, provide for interference where the reference is not to two arbitrators with power to settle differences of opinion by summoning a third arbitrator or referring the matters to an umpire, but is, as here, directly to three arbitrators. Such references would appear not to have been included within the particular provisions of Ss. 8 and 9, though they might fall within the provisions of the other sections including S. 19, Arbitration Act. This would appear to have been the view held in *In re Smith & Service* and *Nelson and Sons* (1) and in *Manchester Ship Canal Company* v. *S. Pearson & Son, Limited* (2), under the English Statute relied on in para. 964, Vol. 1, Halsbury's Laws of England. The appeal should therefore in my opinion be allowed as the appellant and two respondents referred their dispute direct to three arbitrators; and Marten, J., had no jurisdiction on their refusal to proceed with the arbitration to appoint fresh arbitrators under the Arbitration Act. It would not be necessary in this view of the matter to decide whether the special powers conferred by the Act were discretionary with the Court. It would appear to me however that Marten J., placed the right interpretation upon the decision in *In re Eyre & Corporation of Leicester* (3) and that the word "may" never can mean "must" so long as the English language retains its meaning, though the exercise of a discretionary power conferred by the word "may" might, in certain circumstances being established, become imperative on the Judge, as observed by Cotton, L. J., in *In re Baker* (4). It would further appear to me that it would not have been proper for us to interfere with the exercise of the discretion vested in Marten, J., merely upon our own views of the desirability or otherwise of leaving the

(3) [1892] 1 Q. B. 136.
(4) [1890] 44 Ch. 262.

parties in this particular matter to their ordinary remedies in the Court.

G.P./R.K. *Appeal allowed.*

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## A. I. R. 1919 Bombay 28 (1)

HEATON AND SHAH, JJ.

*Byramji Pudumji*—Applicant.

v.

*Emperor*—Opposite Party.

Criminal Revn. Appln. No. 39 of 1919, Decided on 2nd April 1919.

**Cantonment Code (1912), Rr. 97 and 107-A—Conviction for persistent failure—It must refer to past and not future failures.**

An order under R. 107-A, Cantonment Code, inflicting a fine for persistent failure to carry out an order under R. 97 of the Code must, in order to be legal, refer to a failure as regards the past. It is illegal to convict a person under this rule, of a failure in regard to the future. [P 28 C 1]

*Velinkar*—for Applicant.

*S. S. Patkar*—for the Crown.

**Heaton, J.**—It is urged—and I think correctly urged—that the order made by the District Magistrate of Poona, fining the applicant is, in the form it took, illegal. The order was made under the provisions of R. 107-A, Cantonment Code. It was proved to the satisfaction of the District Magistrate on 27th October 1918, that the owner of a house in the Poona Cantonment had persisted in failure to carry out an order made under R. 97, and taking the words of R. 107-A, he was punishable with a fine not exceeding Rs. 5 for every day after the first in regard to which he was convicted of having persisted in the future. He could of course, be convicted with having persisted in the failure only as regards the past; he could not be convicted of a failure in regard to the failure. A fine of Rs. 5 a day, therefore might have been imposed for the material days up to 27th October. But that was not done. The District Magistrate, taking, I have no donbt, a sensible broad view of the affair, came to the conclusion that it was unnecessary to impose a fine for the past failure. But to emphasize the need of obedience to the order previously made, he directed that a fine of Rs. 5 a day should be paid from 1st November. That date was in the future, and as the words of the rule show, he was not empowered to make an order as to the future. That part of his order therefore is illegal and must be set aside and the fine, if paid, should be refunded.

**Shah, J.**—I agree.

G.P./R.K. *Order set aside.*

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## A. I. R. 1919 Bombay 28 (2)

SCOTT, C. J. AND SHAH, J.

*Gulab Raiji*—Defendant—Appellant.

v.

*Bai Tejbai*—Plaintiff—Respondent.

Second Appeal No. 416 of 1915, Decided 8th July 1918, from the decision of Dist. Judge, Broach, in Appeal No. 58 of 1914.

**Bombay Bhagdari and Narvadari Act (5 of 1862), S. 3—Recognized subdivision of bhag purchased by different sales of portions does not offend S. 3.**

The defendant purchased from the plaintiff certain bhagdari lands, and at the same time purchased certain other such lands from another person. The whole of the lands so purchased comprised a recognized subdivision of a bhag. The plaintiff brought a suit to recover the land she had sold on the ground that the sale was illegal and void as being of an unrecognized subdivision of a bhag:

*Held*: that the effect of the two sales being to bring together various dismembered portions of a recognized subdivision of a bhag into the hands of one owner, the transactions did not violate the terms of S. 3 and were not illegal or void. [P 29 C 1]

*G. N. Thakor*—for Appellant.

*Dhirajlal K. Thakore* and *Ratanlal Ranchoddas*—for Respondent.

**Scott, C. J.**—The suit was filed by plaintiff-respondent to recover possession of certain bhagdari lands comprised in a sale made by her to defendant on 25th January 1910, on the ground that the sale being of an unrecognized portion of a peta bhag was illegal and void under the provisions of the Bhagdari Act. The sale by the plaintiff took place at the same time as the sale by a woman named Tejbai to the defendant of other portions of the peta bhag to which the plaintiff's sale related, and they have been held to be one alienation though evidenced by the two documents. They related, taken together, to the whole of Survey Nos. 34, 77, 113, 119 and a portion, namely 2 acres and 20 gunthas of Survey No. 157; and the survey numbers enumerated comprised the whole of the peta bhag or recognized subdivision of a bhag. The remaining portion of Survey No. 157 was actually in possession of the defendant, the transferee under the two sale deeds. It has been held by the learned Judge of of the lower appellate Court that the possession of the defendant was as owner acquired by adverse possession of 2 acres and 2 gunthas comprising the balance of Survey No. 157. The effect of the two sale-deeds therefore on 25th January 1910 was, provided the sale deeds were

not invalid, to vest in the defendant the whole of the peta bhag or recognized subdivision. It is conceded that if by a more elaborate conveyancing procedure care had been taken to vest in a third party the interests of the plaintiff, the defendant and Tejbai by one document, and the third party had then retransferred to the defendant, no objection could have been taken that the transactions violated the provisions of the Bhagdari Act. For S. 5 of that Act provides that nothing in the Act contained shall be construed as prohibiting the alienation of any bhag or share, or recognized subdivision of any bhag or share, if such alienation be in other respects warranted by law, the object and intention of the Act being to prevent dismemberment of bhags or shares or recognized subdivisions thereof in bhagdari villages. It is obvious that the effect of the transactions has not been to effect dismemberment of bhags or shares. It has had the effect of bringing together the various severed portions of a recognised subdivision into the hands of one owner. The substance of the transaction is what must be looked at, and if the substance is regarded, it appears to me clear that there has been no alienation such as is prohibited by the terms of S. 3 of the Act. I would therefore reverse the decree of the lower appellate Court and dismiss the suit with costs throughout upon the plaintiff.

**Shah, J.**—I am of the same opinion.

G.P./R.K. *Decree reversed.*

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## A. I. R. 1919 Bombay 29

PRATT, J.

*Vithaldas Cursondas*—Plaintiff.

v.

*Dulsukhbhai Vadilal* and *others*—Defendants.

Original Civil Suits Nos. 180 and 178 of 1919, Decided on 22nd February 1919.

**Bombay High Court Rules (Original Side) R. 223—Originating summons is not proper where suit involves intricate questions and requires evidence on various points.**

An originating summons is not the proper procedure where the disputed facts are of such complexity as to involve a considerable amount of oral evidence. The action should be confined to matters which are capable of decision in a summary way. [P 30 C 1]

An action was instituted by an originating summons in which the plaintiffs sought a declaration that a partnership between himself and the defendants had been dissolved, and asked for an account of the partnership, damages for breach of the partnership agreement and an indemnity for certain liabilities incurred.

Held: that as considerable evidence would have to be taken in order to determine the matters in dispute, the procedure by way of originating summons was not the appropriate procedure for the action. [P 30 C 1]

*Kania*—for Plaintiff.

*Inverarity*—for Defendants.

**Judgment.**—This is an action instituted by an originating summons in which the plaintiff seeks a declaration that a partnership between himself and the four defendants was dissolved in October 1918, an account of the said partnership, damages for breach of the partnership agreement from defendants 1 and 2 and an indemnity for liabilities incurred in dealings with one Lallubhai. The defendants object that the summons should be dismissed under R. 223, as this form of action is not appropriate to the matters in dispute. Provision was made for this form of action by the addition of appropriate words in S. 26, Civil P. C. But as O. 4, R. 1, requires every suit to be instituted by a plaint, a suit cannot be instituted by originating summons under the Civil P. C. The procedure rests solely on rules made by this Court under the Letters Patent and S. 129, Civil P. C. These rules generally follow the English procedure which is enacted in the rules and orders of the Supreme Court. These limit the procedure to the determination of questions of construction of deeds and wills, of questions arising in the administration of an estate or trust and of questions arising out of requisitions and objections made between vendor and vendee of land. As to the English procedure it seems clear that it does not apply where questions of fact are in dispute. Lord Lindley in the case of *Powers, In re, Lindsell* v. *Phillips* (1) said:

"A summons is not the proper way of trying a disputed debt where the dispute turns on questions of fact;"

and again in *Giles, In re, Real and Personal Advance Company* v. *Michell* (2) Cotton, L. J., said that this form of action

"was intended . . . . . to enable simple matters to be settled by the Court without the expense of bringing an action in the usual way, not to enable the Court to determine matter which involves a serious question."

It is contended that these authorities do not apply as the Bombay rules are

(1) [1885] 30 Ch. D. 291.
(2) [1890] 43 Ch. D. 391.

wider. There is some force in this contention, for our rules go further than the English rules and allow a partner to take out an originating summons and the procedure approximates more nearly to that of a regular suit, for the rules contemplate pleadings. A plaint is required by R. 218 and a written statement is permitted by R. 221. The rules do not forbid questions of fact being determined on an originating summons, and I am not prepared to hold that this form of action is always inappropriate whenever there is a question of fact in dispute. But I think it clear that an originating summons is not the proper procedure where the disputed facts are of such complexity as to involve a considerable amount of oral evidence. There is no machinery for discovery and inspection, and R. 223 indicates that the action should be confined to matters which are capable of decision in a summary way. In the present case considerable evidence will have to be taken both as to the breach of contract alleged against defendants 1 and 2 and the quantum of damages for which they are liable. I therefore dismiss this summons with costs and refer the parties to a regular suit.

G.P./R.K. *Summons dismissed.*

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## A. I. R. 1919 Bombay 30

HEATON AND HAYWARD, JJ.

*Ganesh Mahadev Jamsandekar*—Plaintiff—Appellant.

v.

*Secy. of State*—Defendant—Respondent.

First Appeal No. 190 of 1917, Decided on 23rd July 1918, from decision of Dist. Judge, Ratnagiri, in Suit No. 2 of 1916.

**Civil P. C. (1908), S. 9—Fine imposed and property confiscated by Sea Customs Officer under Sea Customs Act—Suit for recovery of fine and value of confiscated property on ground that there was no legal adjudication under Sea Customs Act—Civil Court held to have jurisdiction to try suit—Sea Customs Act (1878), Ss. 167, 182, 188 and 191—Jurisdiction, Civil Courts.**

The plaintiff's factory was searched by a Sub-Inspector of Police in connexion with a theft. The stolen property was not found in the search, but some silver ingots worth about Rs. 5,000 were found. It was suspected that the silver had been improperly imported by the plaintiff without payment of customs duty. The Sub-Inspector sent for a clerk in the fish-curing yard who belonged to the Salt Department not to the Customs Department, and at his instance attached the silver and made it over to the Sarkarkun. This officer, recording evidence in the absence of the plaintiff, made a report to the Collector of Customs who without calling or hearing the plaintiff and purporting to act under the Sea Customs Act, fined him Rs. 1,000 and also confiscated the silver. The plaintiff brought a civil suit for the recovery of the fine and price of the silver. The District Judge, who entertained the suit, dismissed it on the ground that it was excluded from the cognizance of the ordinary civil Courts. On appeal to the High Court:

*Held*: (1) that the question whether there had been legal adjudication in accordance with the provisions of the Sea Customs Act was not a question excluded from the cognizance of the ordinary civil Courts; (2) that if there had been no legal adjudication then the order of fine and confiscation was ultra vires of the provisions of the Sea Customs Act, and resulted in an ordinary wrong cognizable by the ordinary civil Courts on the general principles underlying S. 9, Civil P. C.

[P 31 C 2]

*A. G. Desai*—for Appellant.

*S. S. Patkar*—for Respondent.

**Heaton, J.**—The plaintiff's suit was dismissed by the District Judge of Ratnagiri on the ground that the Court had no jurisdiction to entertain it. The plaintiff has appealed to us. We have before us only the plaint, the written statement and the judgment of the District Judge, and as the question is one of jurisdiction and the facts have not been determined, we have for the purpose of our decision to assume the truth of the facts stated in the plaint and then determine whether the Courts have jurisdiction or not. The plaintiff's cause of action, to put it briefly, is that some silver belonging to him of considerable value was seized and confiscated by the Customs authorities and that he was subjected to a penalty of Rs. 1,000 and that these things were done under the cover of Ss. 167, 182, 188 and 191, Sea Customs Act (8 of 1878). The plaintiff says these things were wrongfully done. There are two ways in which the question of jurisdiction can be looked at. The first is a very general way which involves a consideration of the judgment of the Privy Council in the case of *Secy. of State* v. *Moment* (1). The question which would then arise is this: supposing the Sea Customs Act excludes the jurisdiction of the civil Courts, is that enactment to that extent ultra vires of the Indian legislature? The second way of looking at the matter is particular and turns entirely on the special facts to be proved. The question raised by this way of looking at the matter is this: Does the Sea Customs Act really exclude the jurisdiction

(1) [1913] 40 Cal. 391=18 I. C. 22=40 I. A. 48 (P. C.).

of the civil Courts in this particular case?

The first and more general view need not really occupy our consideration because unless the plaintiff can show that the Courts have jurisdiction on the particular facts alleged, he cannot succeed whatever view be taken. Of course, unless there is something in the law to prevent it, a plaintiff whose property—and in this case property of considerable value—has been seized and confiscated by a Customs Official and from whom has been extracted a heavy fine must have a right of action on the ground that these things have been wrongly done. The answer to this on behalf of the defendants, who are the Secretary of State for India and the Collector of Customs is this: they say that for the purpose of confiscating property on the ground that customs duty has not been paid on it, and of exacting a penalty, a Special Tribunal has been set up by the Sea Customs Act, and that as this is so the jurisdiction of the ordinary Courts is excluded. The general proposition of law here implied cannot, I think, be disputed and in support of it I will only mention the case of *Balvant Ramchanara* v. *Secy. of State* (2) and the cases therein referred to. As instances in which the principle has been applied, I mention the case of *Lakshman* v. *Antaji* (3) and the case of *Ramchandra* v. *Secy. of State* (4). I need not labour this point, because it was conceded on behalf of the plaintiff that where such a Special Tribunal is proved by law, the jurisdiction of the civil Courts is excluded if the Special Tribunal has acted according to law. There can, I think, be no doubt that such a Special Tribunal is provided by the Sea Customs Act. S. 167 speaks of offences and penalties and gives a long list of them. S. 187 provides that all offences against this Act, other than those cognizable under S. 182 by Officers of Customs, may be tried summarily by the Magistrate. S. 182 provides that all except a very small number of the offences mentioned in S. 167 are to be disposed of by Customs Officers.

The exact words are "such confiscation or penalty may be adjudged." Then follows a classified statement of jurisdiction conferring powers on Customs Officers not dissimilar to, though more limited than, those of First, Second and Third Class Magistrates. Then S. 188 provides that there shall be an appeal and that every order passed in appeal under this section shall, subject to the power of revision conferred by S. 191, be final. The power of revision conferred by S. 191 is conferred on the Local Government. We have here then very clearly indicated a Special Tribunal, and it is a Special Tribunal for adjudging confiscations or both penalties or against a person who is alleged to have committed an offence. It seems to me that where this tribunal operates, especially as the order of the appellate authority is stated to be final, a suit in the ordinary civil Courts will not lie to set aside the order of the Special Appellate Tribunal. At the same time the Government Authorities cannot, to use a colloquial expression, have it both ways. They cannot have absolute immunity from civil suits and at the same time disregard the provisions of the Sea Customs Act. If the Special Tribunal has operated as provided by the Act, well and good. But if there has in fact not been a decision by such a tribunal arrived at in the manner provided by the Act, then the tribunal has not operated and the bar to a suit does not exist.

The general nature of the proceedings of the tribunal is indicated by the use of the word "adjudge," especially as it is used in connexion with what is described as an offence. We have therefore to consider whether the Customs Officer has really adjudged the confiscation and the penalty, in other words, we have to consider whether there has been an adjudication. Now the plaintiff alleges that the officer who claims to have adjudged the confiscation and the penalty never himself took the evidence of the witnesses; that he never saw the plaintiff who may be described as the person accused or heard what he had to say; that the person who did take the evidence was a subordinate official; that he took it in the absence of the accused, who had no opportunity of cross-examining the witnesses; and that the accused was not given any opportunity of adducing evidence in his own favour. As I began by saying, we must, for the purposes of the argument, take these facts to be true, although it may be,

(2) [1905] 29 Bom. 480.
(3) [1901] 25 Bom. 312.
(4) [1889] 12 Mad. 105.

when the case comes to be inquired into, it will be found that they are not true. Now assuming them to be true, it seems to me quite clear that there never was an adjudication of the kind contemplated by the Sea Customs Act. I will not attempt to define what such an adjudication should be beyond this: that it must be a fair hearing of both sides.

Nor will I attempt to say, whether if some of the plaintiff's allegations be found to be true and others untrue, there was or was not an adjudication. I merely assume that all that the plaintiff says is true and then say that if this be so, there never was an adjudication such as is contemplated by the Act. On this assumption therefore there has never been a disposal of the matter by the Tribunal set up by the Sea Customs Act, and therefore the jurisdiction of civil Courts has not been ousted. The case therefore must be remanded to have it determined in the first instance whether there has or has not been an adjudication. If there has not, the civil Court has jurisdiction. If there has been an adjudication, I think the civil Court has not jurisdiction.

The substantial ground on which the plaintiff bases his suit is that there has been an adjudication, and that is the only ground that we need in this case seriously consider.

There is a trivial claim for damages apart from the claim on account of confiscation and the claim on account of the fine imposed. For these damages the persons personally responsible would, according to the plaintiff's statement, be persons who are not made defendants in the suit, and the plaint which we have read very carefully does not seem to me to make out a case in the matter of these damages against the Secretary of State, and I think therefore that this portion of the claim must be disregarded. This case has been wrongly decided on a preliminary point. Therefore, it must be remanded to be heard de novo. But the issues will have to be re-framed, and the only substantial issue is: whether there has been an adjudication such as is provided by the Act. If there has, the suit should be dismissed. If there has not, the order of confiscation and fine should be set aside, and the property confiscated or its value and the amount of fine, with interest in both cases, ordered to be returned to the plaintiff. The Court should consider only the proceedings taken by the Customs authorities. It should not go into the question of the legality of the actual seizure of the silver because that is a matter irrelevant to this suit. The only matters relevant on the plaint and the facts stated therein are whether the customs authorities, not the people who seized the silver, made an adjudication as provided by the Act. We have been unable to find that any rules have been framed by the Chief Customs authority, as provided by S. 9 of the Act, regulating the procedure and proceedings of the Customs authorities in the adjudication of confiscation and penalties. If such rules have been framed, they should be produced. If they have not, it may be that their absence will make the decision on the matter in dispute more difficult than otherwise it would be; nevertheless the matter will have to be decided. My learned brother has quoted passages from judgments in English cases which should help the lower Court in arriving at a decision.

In my opinion the decree of the lower Court should be set aside as erroneously decided on a preliminary point and the case remanded as I have stated. Costs of this appeal should be costs in the suit.

**Hayward, J.**—I concur. I do not understand the learned pleader for appellant seriously to press the somewhat indefinite and vague claim for Rs. 17, "compensation for pain and mental anxiety and bodily troubles and hardship and loss caused by the unjust and illegal acts of the officers and servants of Government."

It might prove an interesting study in human nature to enter upon an inquiry into this demand, but it seems to me the temptation ought to be resisted on the principle "*de minimus non curat lex*" and our attention ought to be focussed solely on the really substantial claim for the recovery of the Rs. 1,000 fine and nearly Rs. 5,000 worth of bar silver alleged to have been wrongfully confiscated by the executive officers of Government purporting to act under the authority of the Sea Customs Act.

Now the appellant's claim in that respect was that the seizure of the silver was made in an illegal manner; that the question whether the silver had or had not been improperly imported without payment of duty was wrongly decided;

that he had not been given a fair hearing and that the order of fine and confiscation was therefore passed illegally under S. 167, Sea Customs Act. The respondents' defence was that there had been no illegal seizure, that the silver had been improperly imported without payment of duty, and that the order of fine and confiscation had been legally passed by the Collector of Customs under S 182 and had become final upon confirmation by the Commissioner and Government under Ss. 188 and 191 of the Act and was therefore beyond the jurisdiction of the ordinary civil Courts. It seems to me in that respect, that the legality or otherwise of the manner of seizure is irrelevant. It is not the manner of seizure but the improper importation without payment of duty, which is the legal justification of fine and confiscation under S. 167, Sea Customs Act, and it seems to me further that the question whether the silver was improperly imported without payment of duty is one that has been specially reserved for adjudication by the Special Tribunals established for that special purpose by Ss. 182, 188 and 191 of the Act and that that question is therefore excluded from the cognizance of the ordinary civil Courts on the principles laid down in the cases of *Lakshman* v. *Antaji* (3), *Balwant Ramachandra* v. *Secretary of State* (2) and *Bhaishankar* v. *Municipal Corporation of Bombay* (5). But it seems to me nevertheless that the question whether there has been a legal adjudication in accordance with the provisions of the Act is not a question excluded from the cognizance of the ordinary Civil Courts. If there has been no legal adjudication, then the order of fine and confiscation was ultra vires of the provisions of the Act and resulted in an ordinary wrong cognizable by the ordinary civil Courts on the general principles underlying S. 9, Civil P. C. It is unnecessary to consider here the ruling of the Privy Council in the case of *Secretary of State* v. *Moment* (1), as the former question has no reference to the liability of the Secretary of State and the latter question has not been excluded by the Act contrary to the provisions of S. 32, Government of India Act, 1915.

The real question therefore to be determined in this litigation is, whether there has or has not been a legal adjudication in accordance with the provisions of the Act. That will involve determining, after evidence has been recorded, what was the exact method adopted for the purpose of the adjudication and whether that method was in accordance with the express or implied provisions of the Act. It is possible that some express procedure has been laid down by rules framed under the Act. But, if not, regard should be had to the following remarks of Lord Loreburn, L. C., in the case of *Board of Education* v. *Rice* (6):

"Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

These remarks were quoted with approval by Viscount Haldane, L. C., in the case of *Local Government Board* v. *Arlidge* (7), in which he said (at p. 132):

"When the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a Court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal. In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary Court, to authorities whose functions are administrative and not in the ordinary sense judicial. Such a body as the Local Government

(5) [1907] 31 Bom. 604.

(6) [1911] A. C. 179.
(7) [1915] A. C. 120.

Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community. Its character is that of an organization with executive functions. In this it resembles other great departments of the state. When therefore Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently."

And again, at p. 133:

"The result of its inquiry must, as I have said, be taken, in the absence of directions in the statute to the contrary, to be intended to be reached by its ordinary procedure. In the case of the Local Government Board it is not doubtful what this procedure is. The Minister at the head of the Board is directly responsible to Parliament like other Ministers. He is responsible not only for what he himself does but for all that is done in his department The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist that he and other members of the Board should do everything personally would be to impair his efficiency. Unlike a Judge in a Court he is not only at liberty but is compelled to rely on the assistance of his staff."

Lord Shaw also said in the same case at p. 138:

"When a central administrative board deals with an appeal from a local authority it must do its best to act justly, and to reach just ends by just means. If a statute prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means. In regard to these certain ways and methods of judicial procedure may very likely be imitated; and lawyer like methods may find especial favour from lawyers But that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are ex necessitate those of Courts of justice is wholly unfounded. This is expressly applicable to steps of procedure or forms of pleading."

If it should be determined upon these principles that there has been a legal adjudication in accordance with the provisions of the Act, then the suit should be dismissed as outside the jurisdiction of the Civil Courts. If it should, on the other hand, be determined that there has been no legal adjudication in accordance with the provisions of the Act, then the order of fine and confiscation should be declared ultra vires and a decree should be passed for refund of the fine and restoration of the confiscated property in exercise of the ordinary jurisdiction of the Civil Courts. It has been argued before us that liability for the wrong or tort, if any, committed by the Collector of Customs would not extend to the Secretary of State, as the correctness of the decision of Sir Barnes Peacock in the case of *Peninsular and Oriental Steam Navigation Co.* v. *Secy. of State* (8) has been doubted by Sir Lawrence Jenkins in the case of *Shivabhajan* v. *Secy. of State* (9). But it does not seem to me that those cases have here any application, as the liability in those cases depended solely on the conduct of the subordinate servants while here it depends largely on the appropriation of the property for the benefit of the Secy. of State. There would appear no room for doubt in these circumstances as to the liability of the Secy. of State under S. 32, Government of India Act, 1915.

The suit must therefore in my opinion, be remanded as proposed for trial on the issues above indicated and in the light of the above remarks under O. 41, R. 23, Civil P. C.

G.P./R.K. *Appeal allowed.*

(8) [1868-69] 5 B. H. C. R. App. 1.
(9) [1904] 28 Bom. 314.

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## A. I. R. 1919 Bombay 34

HEATON AND SHAH, JJ.

*Dinu Yesu Desai*—Plaintiff—Appellant.

v.

*Shripad Baji Carware*—Defendant—Respondent.

Second Appeal No. 1181 of 1916, Decided on 4th February 1919, from decision of Dist. Judge., Satara in, Appeal No. 342 of 1915.

**(a) Civil P. C. (5 of 1908), S. 47—Redemption decree not executed within time—Fresh suit does not lie.**

Where a redemption decree, passed before the coming into force of the Transfer of Property Act, provided in terms that the right to redeem would be barred in case the amount provided by the decree was not paid within the time fixed by the decree and a default was committed in paying the said amount:

*Held*: that a fresh suit, brought after the period for executing the decree had expired, was not maintainable. [P 35 C 2]

**(b) Transfer of Property Act (4 of 1882), Ss. 89 and 90—Act is not retrospective—Decree before Act—Last instalment payable after Act—Act does not apply.**

The Transfer of Property Act has no application to a decree passed before that Act came into force, but the last instalment payable under which fell due after that Act came into force. [P 35 C 1]

*S. S. Patkar*, *R. A. Randive* and *W. R. Mankar*—for Appellant.

*B. G. Rao*, *G S. Rao* and *K. N. Koyajee*—for Respondent.

**Shah, J.**—This appeal arises out of a suit brought by the plaintiff to redeem a mortgage of 1863. The defendants pleaded that the present suit was not maintainable in consequence of the decree in an earlier suit for redemption. In 1885 the plaintiff's predecessor-in-title had filed Suit No. 985 of 1885 for redemption, and obtained a decree on 20th February 1888 in these terms:

"It is decreed that the plaintiff do redeem on payment to defendants 1 and 2 the sum of Rs. 518-11-6 and costs in both the Courts by six equal instalments, each of which is to be payable at the close of March in the years 1888—1893. On plaintiff's default to pay the whole sum by the end of March 1893, his right to redeem shall be for ever barred."

The trial Court disallowed the defendants' contention and passed a decree in favour of the plaintiff for redemption. The lower appellate Court reversed that decree and dismissed the plaintiff's suit on the ground that the decree in the previous suit of 1885 was a bar to the present suit. In the appeal before us it has been contended on behalf of the plaintiff that a second suit is competent, and in support thereof the recent decision of the Full Bench in the case of *Ramji* v. *Pandharinath* (1) is relied upon. After a consideration of the arguments urged on behalf of the appellant I am of opinion that the ratio decidendi in *Ramji's* case (1) has no applicttion to the facts of this case. The decree in the suit of 1885, which was decided under the Dekkhan Agriculturists' Relief Act, was passed in February 1888; and though the last instalment payable under the decree fell in March 1893, i. e., after the Transfer of Property Act came into force in this Presidency, it is clear that the provisions of the Transfer of Property Act could not apply to that decree The provisions of S. 2 of the Act are clear and the decision in *Chennaya* v. *Malkapa* (2) is to the same effect. Therefore there was no scope for any order absolute in respect of this decree as provided by the Transfer of Property Act, nor for any final decree as contemplated by the Code of 1908. The decree of 1888 was capable of execution, and it provided in terms that if there was a default in the payment of the sum due thereunder, the right to redeem was to be for ever barred. Admittedly the execution of this decree is time barred long since, and under the provisions of S. 47 of the Code, corresponding to S. 244 of the old Code, no fresh suit can lie.

This case is governed by the decisions of this Court prior to the Transfer of Property Act of which *Ladu Chimaji* v. *Babaji Khanduji* (3) is a type. In these cases the subsequent suit has been held to be not maintainable. The ratio decidendi of these cases would still govern a case in which the earlier decree provided in terms that the right to redeem would be barred in case the amount provided by the decree was not paid within the time fixed under the decree. It is not necessary to refer to the recent cases which deal either with decrees to which the provisions of the Transfer of Property Act or the corresponding provisions of Code of 1908 might be applicable. The learned pleader for the appellant has not been able to cite a single case in which in spite of the earlier decree containing such a provision as we have in the decree of 1888 in this case, a fresh suit for redemption is held to be maintainable. I am not sure that even if the Transfer of Property Act applied and if the earlier decree contained the provision such as we have in this case, a second suit for redemption would be maintainable. But that is a point which need not be considered in this case. I would therefore, confirm the decree of the lower appellate Court and dismiss the appeal with costs.

**Heaton, J.**—I agree. At the time when the earlier decree in the suit of 1885 was made. the only method known to our law in this Presidency by which it could be given effect to was by execution proceedings and therefore as provided by S. 244 of the old Code, a second suit would not lie. The only possible way in which this difficulty could be overcome, would be by showing that the declaration in the decree that on failure to pay the debt the right to redeem shall be for ever barred, did not operate of itself, but could only be made operative by an order absolute or a final decree. But at the time this decree was made there was no provision in this Presidency either for an order absolute or for a final decree.

(1) [1919] 43 Bom. 334=49 I. C. 894 (F. B.).
(2) [1896] 20 Bom 279.
(3) [1883] 7 Bom. 532.

Everything was done in execution proceedings. The Code of 1908, which provides for a final decree in mortgage suits, obviously could not apply to a decree made sometime in the eighties of the last century. The Transfer of Property Act could not apply, because it only came into operation in this Presidency in the year 1893. Therefore it is impossible, as I think, to get away from the effect of the pronouncement in the decree itself. It follows from this that the right to redeem has long been barred and no suit to redeem, therefore can succeed.

G.P./R.K. *Appeal dismissed.*

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## A. I. R. 1919 Bombay 36

HEATON AND HAYWARD, JJ.

*Godhra Municipality*—Applicants.

v.

*Harilal Lallubhai Soni* — Opposite Party.

Criminal Revn. Appln. No. 262 of 1918, Decided on 25th September 1918, against order of acquittal passed by Bench of Magistrate, Godhra.

**(a) Bombay District Municipalities Act (3 of 1901), S. 96—Permission to build granted —Permission purported to be limited for six months —No offence in absence of proof that work was not begun within six months.**

Accused obtained permission from the complainant Municipality to re-build his house. The permission purported to be limited in effect to six months. The accused was found building his house three years aftrs the date of the permission.

*Held:* that there being no proof that the work was not begun within six months from the date of the permission, the accused was not guilty of any offence. [P 36 C 2]

**(b) Bombay District Municipalities Act (3 of 1901), S. 96—Period within which to begin but not to finish can alone be stipulated.**

Per *Heaton, J.*—A Municipality has power to say that a work to which it gives permission under S. 96 shall be begun within a certain time, but it is doubtful whether it has power to say that a work must be finished within a given time. [P 36 C 2]

**(c) Bombay District Municipalities Act (3 of 1901), S. 96—Time limit in sanction to build is ultra vires.**

Per *Hayward, J.*—A time-limit was not contemplated by the legislature in enacting S. 96 and therefore such a limit contained in a permission to build is ultra vires. [P 37 C 1]

*G. N. Thakor*—for Applicant.

*K. M. Munshi* and *M. H. Mehta*—for Opposite Party.

**Heaton, J.**—In this case, my learned colleague and myself are both agreed that a case is not made out for interfering with the order of acquittal. For myself I will express my opinion but I do not propose to give detailed reasons for it, as I think that the point discussed, should it arise again, will have to be decided by a more definite consensus of opinion. I am disposed to think that the Municipality has power to say that a work to which it gives permission under S. 96, Bombay District Municipalities Act (Bombay Act 3 of 1901) shall be begun within a certain time. But I am doubtful whether the Municipality has power to say that a work must be finished within a given time. It is not proved in this case that the work was not begun within the time stated. It follows therefore that in my opinion, the order of acquittal was correct. I would discharge the Rule.

**Hayward, J.**—The accused obtained permission to re-build his house on 22nd October 1915. This permission purported to be limited in effect to six months. It was granted by the Godhra Municipality. It appeared that he was rebuilding his house a considerable time after the lapse of the period limited, viz. on 3rd January 1918. He was accordingly prosecuted for re-building without permission, but he was acquitted, on the ground that the limitation of the period was illegal, by the Bench of Honorary Magistrates, Godhra. The substantial question before us is, whether the period of limitation was legally imposed by the Godhra Municipality under S. 96, Bombay District Municipalities Act (Bombay Act 3 of 1901).

Now it was held that such limitation was illegal in the case of *Queen-Empress* v. *Thakordas* (1) under S. 33 of the old Municipal Act Bom. Act 6 of 1873 It has however been contended that that ruling should not be applied here because of the words "the Municipality may issue such order as they think proper with reference to the work proposed and etc." in Cl. 2, S. 96, Bombay District Municipalities Act 3 of 1901. It might, of course, be held that the imposition of a period of limitation would literally fall within these words; but it would appear to me, after reading the whole section with its many clauses, sub-clauses and sub-paragraphs, that such a power was not contemplated. The main object apparently was to secure that there should be a speedy decision as to the conditions under which re-building should be al-

(1) [1893] Rat. Unrep. Cr. C. 684.

lowed in order to interfere as little as possible with the vested rights of owners. It was similarly held that no variation could subsequently be made in the conditions granted by Sir Stanley Batchelor in the case *Kareem Ranjan* v. *Emperor* (2). It would, at the same time, be too much in my opinion to say that there could arise no circumstances whatever under which a permission once granted might not reasonably be held to have lapsed but if express power to impose limitation by time should be thought necessary that would, in my opinion, be a matter for express enactment by the legislature.

We ought, therefore, in this view to hold that the Bench of Magistrates rightly disregarded the time limitation contained in the permission to rebuild as ultra vires and a limitation not contemplated by the legislature in enacting in its present form S. 96, Bombay District Municipalities Act 3 of 1901.

G.P./R.K. *Rule discharged.*

(2) [1917] 39 I. C. 298.

## A. I. R. 1919 Bombay 37

SCOTT, C. J. AND HAYWARD, J.

*Ali Mahomed Eid*—Defendant — Appellant.

v.

*Fatima Mahomed Ebrahim*—Plaintiff —Respondent.

Civil Ref. No. 11 of 1918, Decided on 28th January 1919, against order of Political Resident at Aden.

**Limitation Act (9 of 1908), Art. 61—Maintenance of child—Suit by Mahomedan divorced wife— Art. 61 applies—Arrears of prior to three years cannot be recovered.**

A suit by a divorced wife of a Mahomedan for the maintenance expenses of her minor daughter falls within the scope of Art. 61, but the plaintiff is not entitled to recover anything prior to three years before the suit. [P 37 C 2]

*Ratanlal Ranchhoddas* — for Appellant.

**Scott, C. J.**—This is a claim by a divorced wife of a Mahomedan who has married again for the maintenance expenses of her minor daughter by the first husband. The Courts at Aden have awarded the sum of Rs. 20 a month calculated according to the cost of living at Aden for maintenance for a period from 20th April 1913 to 20th October 1917. The latter date is the date up to which the plaintiff continued to have custody of her daughter. The earlier date is the date upon which the defendant's mother-in-law died, who had under an agreement with the defendant undertaken to support the daughter. Between the two dates covered by the Court's decree the only custodian of the child was her natural mother. It is laid dawn in *Emperor* v. *Ayshabai* (1) that

"according to the Mahomedan law a mother is entitled to the custody of her children even where she has been divorced by her husband, but that does not relieve the father from the obligation of maintaining the children. The law intends that the mother ought to have the custody of the girls until they reach the age of puberty because till then they require her nurture and care; the law does not impose upon the mother the obligation of maintaining the children because she keeps them in her custody, as she is entitled to do."

The only question raised on behalf of the defendant apart from the question of the monthly quantum of maintenance, a matter upon which we cannot differ from the Aden Court is the question whether maintenance is payable for the whole time covered by the decree or whether it must be limited according to the provisions of Art. 61, Lim. Act. That article provides a limitation where the suit is for money payable to the plaintiff for money paid for the defendant. We are of opinion that the payments claimed by the plaintiff fall within the scope of that article. It has been held in England that where a person paid the funeral expenses of his deceased daughter during her husband's absence, the husband was liable upon a count for money paid by the plaintiff for the defendant: see *Jenkins* v. *Tucker* (2) and *Ambrose* v. *Kerrison* (3). As the article provides that the suit must be brought within the three years from the date when the money is paid, the plaintiff is not entitled to recover any payments made prior to three years before suit. The suit was filed on 15th November 1917, and the plaintiff is entitled to recover Rs. 20 a month for three years prior to the date of the suit. Under S. 13 of the Aden Act the costs will be costs in the suit.

G.P./R.K. *Order accordingly.*

(1) [1904] 6 Bom. L. R. 536.
(2) [1788] 1 H. Black 90.
(3) [1851] 10 C. B. 776.

## A. I. R. 1919 Bombay 38

SCOTT, C. J AND HAYWARD, J.

*Hanmant Apparao Deshpande* and *others*—Plaintiffs—Appellants.

v.

*Ramabai Hanmant Meghashyam*—Defendant—Respondent.

Second Appeal No. 764 of 1916, Decided on 30th January 1919, from decision of Dist Judge, Bijapur, in Appeal No. No 115 of 1914.

**Registration Act (16 of 1908), S. 49 — Unregistered document relating to moveable and immovable property—Document can be used in respect of moveable property.**

The fact that a document relating to immovable and moveable property is not registered would not prevent the party entitled from suing on that document in respect of the moveable property. [P 39 C 1]

*K H. Kelkar*—for Appellants.

*Nilkanth Atmaram*—for Respondent.

**Judgment**. — The question in this appeal is whether the appellants are entitled to a fourth share of a cash allowance belonging to the descendants of Atmaram, Malhar and Meghashyam, the sons of Tukopant. The three branches of Tukopant's family were entitled each to one-third share of the vatan property and the plaintiffs' ancestor sued in 1864 to recover his proportionate share of the vatan. In the course of the suit an agreement, Ex. 44, was passed by the defendant to the plaintiffs in which the plaintiffs' father's right to a third share in certain lands was recognized, and also his right to a quarter share in the cash allowance of Rs. 63.

The learned Judge holds that the share in the cash allowance was paid according to the agreement from 1865 to 1880, but it does not appear to have been paid after that date. The question of limitation did not arise in the lower appellate Court, as that had been decided in favour of the plaintiffs by the trial Judge, who held that Art. 131, Limitation Act applied and that time only ran from the date of demand and refusal in the case of a periodically recurring right, such as a share in the cash allowance. The point of limitation was not pressed in the lower appellate Court. The learned Judge, however held that according to the Registration Act of 1864, which was in force when the agreement, Ex. 44, was passed, the document could not be received in evidence as it related to immovable property. He does not consider whether the provisions regarding the cash allowance were separable from the provisions regarding the immovable property, and whether the cash allowance would fall within the term "immovable property" in the Registration Act of 1864. But being of opinion that the document was compulsorily registrable, he held that it could not be used as evidence of the plaintiffs' claim, and accordingly dismissed the plaintiffs' suit. The agreement has been set out by the learned Judge of the trial Court in his judgment. It provides that lands which are admittedly of the plaintiffs' father's share should be enjoyed by him, but with regard to the cash allowance one-fourth share being kept for remuneration for, looking after vatan business and for charity, according to custom, the plaintiffs' father should have one share with Ganesh, Meghashyam and Atmaram. Cl. 3 provides that the one-third share in the one-third income of their branch of the inam garden land should be given to the plaintiffs father and that the plaintiffs' father should receive his share of any miscellaneous income that might be received, Cl. 5 is:

"There is a debt of a Savkar on account of mortgage of the vatan effected previously by the gumasta. Out of it, some has been paid, and there is a balance that will have to be paid to the savkar hereafter. You should pay that to me according to your third share."

The learned Judge of the lower appellate Court reads it as meaning that plaintiffs' father is to be liable for payment of his share of the balance which will have to be paid in future. The correctness of that interpretation is borne out by the opinion of the High Court Translator to whom we have referred the document. There was therefore at the time of the agreement no claim by the maker Ganesh, against the plaintiffs' father for any debt already matured which the plaintiffs' father was bound to pay by way of contribution. The plaintiffs' father's liability in that respect lay in the future. There is therefore, no reason to hold that under the agreement the payment of his share of what might have to be paid to the savkar in the future would be a condition precedent to the receipt by him of his share of the cash allowance, and we have the opinion of the lower appellate Court that in fact the share of the cash allowance was received from 1865 to 1880.

Then we have to consider whether the provision regarding cash allowance can fairly be separated from the provisions regarding the vatan land, so that the document may be looked at for the purpose of this claim to the share in respect of the cash allowance. In that connexion we must first consider whether a cash allowance should be treated as immovable property within the meaning of the Registration Act of 1864. Now the allowance is an allowance by Government to a Deshpande family, presumably as remuneration for public services and it appears to fall within the category, referred to by Sir Charles Sargent in *Desai Motilal Mangal* v. *Desai Parashotam Nandlal* (1), of remuneration for a public office not incapable of being held by a person who is not a Hindu, and that being so according to the judgment of Sir Charles Sargent, based upon the authority of the Privy Council judgment in *Maharana Fatteksangji* v. *Desai Kallianraiji* (2), the rule of Hindu law by which remuneration for hereditary offices was regarded as immovable property would not apply. We have the authority of the Madras High Court in a case which so far as we can ascertain has never been questioned, namely *Thandavan* v. *Valliamma* (3), that the fact that a partition document relating to both immovable and moveable property had not been registered did not prevent the party entitled from suing on that document in respect of the moveable property. For these reasons we are unable to agree with the judgment of the learned Judge that the plaintiffs' case must fail because Ex. 44 has not been registered. The defendant cannot rely upon S. 54, Contract Act, since there was no reciprocal promise which required to be performed before the plaintiff's father could claim payment of the cash allowance, and she cannot rely upon the limitation Act, because the point of demand and refusal has not been supported by any evidence in the trial Court, and has been abandoned in the lower appellate Court. The appeal must therefore be allowed and the decree reversed. There will be a declaration that the plaintiffs are entitled to receive Rs. 15-12-0 a year as their one-fourth share of the cash allowance and a decree for Rs. 47-4-0 as the allowance for three years before suit. There will be a decree for the plaintiffs for the costs of suit throughout.

G.P./R.K. *Appeal allowed.*

(1) [1894] 8 Bom. 92.
(2) [1873-74] 1 I. A. 34=13 B.L.R. 254 (P.C.).
(3) [1892] 15 Mad. 336.

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## A. I. R. 1919 Bombay 39

HEATON AND PRATT, JJ.

*Emperor*

v.

*Lallu Waghji*—Accused.

Criminal Ref. No. 39 of 1918, Decided on 12th November 1918, from order of Sub-Judge, Ahmedabad.

**(a) Landlord and Tenant—Distraint—Seizure for distraint of chattel may be actual or constructive.**

A seizure for distraint of chattels may be either actual or constructive. It is not necessary that the goods must actually be touched or handled. [P 40 C 1]

**(b) Penal Code (1860), S. 379—Physical possession—Possession depends upon physical possibility of possessor dealing with thing exclusively—Physicial contact is not necessary—Bombay Land Revenue Code (1879), S. 154.**

Physical contact is not necessary to complete physical possession and possession depends upon the physical possibility of the possessor dealing with the thing exclusively. [P 40 C 1]

Accused having made default in the payment of land revenue, the Mamlatdar proceeded to their house and under S. 154, Bombay Land Revenue Code made a panchnama declaring their buffaloes to be under attachment. Subsequently the accused removed the buffaloes:

*Held*, that the Mamlatdar must be deemed to have been in possession of the buffaloes and that their removal constituted the offence of theft. [P 40 C 2]

*R. J. Thakor* for *G. N. Thakor*—for Accused.

*S. S. Patkar*—for the Crown.

**Pratt J.**—This is a reference from the Sessions Judge of Ahmedabad in the case of accused 1, Lallu Waghji who was convicted of the offence of theft by the first class Magistrate of Nadiad. Lallu Waghji was accused 1 in the case before the Magistrate and he and two others were convicted of theft. The two others, accused 2 and 3, appealed to the Sessions Judge and the Sessions Judge reversed the convictions of accused 2 and 3, under S. 379. The case of accused 1, Lallu Waghji, is referred to this Court, as no appeal lay in his case the sentence being one of simple imprisonment for three weeks only.

The facts out of which the convictions arose are as follows; Accused 2 and 3, had made a default in the payment of land revenue and the Mamlatdar proceeded to their house to make a distraint of

moveables under S. 151, Bombay Land Revenue Code. He found two she-buffaloes belonging to these accused which were being milked by a woman of the defaulters' house-hold. He told her he intended to attach the buffaloes and the woman said that he might do so after she had finished milking them. The Mamlatdar allowed her to finish and then made a panchnama declaring the buffaloes to be under attachment. Accused 2 and 3, tried to remove the buffaloes on the pretext of watering them but were prevented from doing so by the Mamlatdar. Subsequently at the instigation of accused 1, Lallu Waghji, who is a leading villager, accuseds 2 and 3, untied and removed the buffaloes. The Sessions Judge is of opinion that the removal of the buffaloes did not amount to theft, because the buffaloes were not at the time in the possession of the Mamlatdar. He says in his judgment that it is necessary for the person effecting the attachment actually to lay hands on the animals or some fastening thereof and that until that is done, there is no attachment any more than there is arrest without imposition of hands

We think this statement of law is incorrect. The English common law rule is that except in case of submission, arrest of person consists of the actual seizure or touching of the body of a person with a view to his detention. This rule would no doubt be followed in India although there is no express authority on the subject, but it has no application to distraint of chattels. The attachment was not under the Code of Civil Procedure, and therefore the provision of O.21, R. 43, which require actual seizure, do not apply. The common law rule as to seizure for distraint of chattels is that the seizure may be either actual or constructive. This is illustrated by the case of *Cramer* v. *Mott* (1), where the refusal of a landlord to allow the owner of a piano let on hire to his tenant to remove the piano until his rent was paid was held to be a sufficient seizure, although the landlord had never touched the piano.

The point which the Sessions Judge had to consider was whether the buffaloes were in possession of the Mamlatdar. Now physical contact is not necessary to complete physical possession, and possession depends upon the physical possibility of the possessor dealing with the thing exclusively. The facts here found are that the Mamlatdar had a statutory right to take possession, he came to the place where the buffaloes were with the intention of taking possession, he made a declaration and the panchnama that he had taken possession and he exercised the right of possession by forbidding the defaulters from removing them. On these facts we think the Mamlatdar was in possession and that the offence of theft was constituted by the removal of buffaloes. We therefore see no reason to interfere with the conviction and sentence passed by the Magistrate, first class, of Nadiad, and direct that the record and proceedings be returned.

**Heaton, J.**—I concur.

G.P./R.K. *Conviction Confirmed.*

(1) [1870] 5 Q. B. 357.

## A. I. R. 1919 Bombay 40

MACLEOD, C. J. AND HEATON, J.

*Govind Laxman Gokhale*—Appellant.

v.

*Hirachand Mancharam*—Respondent.

Original Civil Appeal No. 17 of 1919, Decided on 29th July 1919, from decision of Marten, J., reported in 50 I. C. 403.

**(a) Practice—Precedent—General rules of construction laid down—Decision following such rules cannot be laid as precedent.**

Where a general rule of construction has once been laid down by authority, a decision arising from its application to a particular set of facts cannot operate as a precedent, for the very remote chance of any two sets of facts being absolutely similar may be excluded. No Judge can be fettered by an attempt by another Judge to lay down any rule of construction based on his opinion on the facts of the case before him. [P 41 C 2]

**(b) Contract Act (9 of 1872), S. 3—Draft of agreement made—Final paper agreed to be made through vakil—Terms in draft can be varied but agreement is effectual as contract.**

Where a document forms merely the basis of a future agreement, it is open to either party to suggest fresh terms as to the price or any other matter. The mere fact however that an agreement provides that a bargain paper is to be made through a vakil cannot of itself prove that there is a condition precedent to the agreement becoming effectual as a contract. [P 42 C 2]

*Kanga* and *Setalvad*—for Appellant.

*Bahaduri* and *Taraporvala*—for Respondent.

**Macleod, C. J.**—This is an appeal from the decision of Marten, Judge, dismissing the suit which the plaintiff had filed praying that the defendant might be ordered to specifically perform an

alleged agreement dated 28th November 1917, and to do all acts necessary for carrying out his part of the agreement.

The facts are not in dispute and the evidence in the case is purely documentary. On 28th November 1917, the plaintiff and defendant drew up two writings in Gujarati which are Exs. A and A-I in the case. It is admitted that for all intents and purposes the documents are in identical terms. Ex. A was signed by the defendant and Ex. A-1 by the plaintiff. The plaintiff contended that those two documents constituted a complete agreement for the sale by the defendant to the plaintiff of a certain property for Rs. 2,15,000. Looking at the documents this would at first sight appear obvious. They contain the names of the parties, the description of the property to be sold, the price to be paid, a provision regarding the division of the costs of the conveyance, etc., the conditions that the seller must make out a marketable title, and that the vendor must get the signature of a certain adopted son on the sale deed, a provision that the seller has not to pay brokerage, and the time for completion. Finally each party writes:

"I have given and taken from you the agreement to the above effect of my own free will and pleasure."

The main defence is contained in para. 2 of the written statement:

"The defendant says that the Gujarati writings signed by the plaintiff and defendant respectively were merely the terms agreed on as a basis for the contract and not the contract itself which was to be made through a vakil as stated in Cl. 1 of the Gujarati writing."

After these documents were executed, a draft agreement in English was prepared but the parties could not agree to the terms of the draft. Eventually, on 8th December 1917, the defendant's solicitors wrote that as the plaintiff did not agree to the terms of the draft agreement as altered by them, there was no course left open to the defendant but to break off the negotiation for the sale of the property; that the Gujarati Chitti was not the agreement which the parties intended to enter into for the sale of the property, as their client understood that the altered agreement for sale and all the necessary terms and conditions of such sale would be entered into at the office of the vakil as provided in the said Chitti. This contention found favour with the learned trial Judge. After referring to various authorities he said:

"I think the words "the conditions in respect thereof are as follows" are important, and it is also important that the first of the conditions referred to is for a bargain paper through a vakil. The reference to the more formal document (viz., the bargain paper) is therefore a "condition," and according to Lord Parker, that fact is generally if not invariably conclusive against the reference being treated as the expression of a mere desire." Further, I think there was a special reason here for the parties requiring the services of a vakil before they were finally bound. That reason was the situation with reference to the two High Court suits, which was a peculiar one and which Cls. 2 and 4 of Ex. A might not entirely meet. Then, too, I think it is in favour of the defendants that the earnest money was to be paid on the execution of the bargain paper and not on the execution of Ex. A."

The fallacy in this argument, with due respect, is the failure to observe that the word "condition" has two meanings. It is often used as synonymous with "term" and ordinarily when it is stated in a document which takes the form of an agreement that "the conditions are as follows" as it is stated in Ex. A, the word "condition" means "term." The commonest occasion when the word has this meaning is when conditions of sale are drawn up for an auction. When a successful bidder signs the agreement annexed to the conditions of sale, those conditions become part of the contract. Therefore the mere fact that a bargain paper was to be made through a vakil cannot of itself prove that there was a condition precedent to the agreement becoming effectual as a term of the agreement. There are a great many cases reported where the question before the Court has been whether or not on the evidence in the case there has been a concluded agreement, if there is a provision for the execution of a formal agreement thereafter, and this is to be regretted as once the general rule of construction has been laid down by authority, a decision arising from its application to a particular set of facts cannot operate as a precedent, for the very remote chance of any two sets of fact being absolutely similar may be excluded. And in my humble opinion no Judge can be fettered by an attempt by another Judge, to law down any special rule of construction based on his opinion on the facts of the case before him. The general rule of construction was laid down by the House of Lords in *Rossiter* v. *Miller* (1)

(1) [1878] 3 A. C. 1124.

and it will be as well to set out the facts of that case. Certain land had been laid out in plots and a plan prepared. Eight conditions were printed on the plan headed: "The following are the conditions of sale." After the conditions came the following clause:

Each purchaser will be required to sign a contract embodying the foregoing conditions and providing for the payment of a deposit at the rate of 10 per cent. and for the completion of the purchase within two months of the contract."

Miller offered orally to purchase some of the lots for £1000 and was informed he must purchase under the conditions printed on the plan. Then certain letters passed and it was contended that Miller's offer had been accepted. Cairns, L. C., said: "The main question . . is whether there was . . a concluded contract." Then after setting out the conditions of sale and the correspondence the Lord Chancellor proceeded:

"I pause there for the purpose of pointing out . . . . that in these conditions there are to be found the terms of a contract, such as might reasonably be expected to be proposed with regard to sales of plots of land of this description. . . .If you find, not an unqualified acceptance of a contract, but an acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise, then undoubtedly you cannot, upon a correspondence of that kind, find a concluded contract."

Lord Hatherley said:

"If you can find the true and important ingredients of an agreement in that which has taken place between two parties in the course of a correspondence, then, although the correspondence may not set forth, in a form which a solicitor would adopt if he were instructed to draw an agreement in writing, that which is the agreement between the parties, yet, if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters be clearly and distinctly stated, although only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties, merely because that letter may say: 'We will have this agreement put into due form by a Solicitor.'"

Lord Blackburn said:

"But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the facts is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed."

Lastly Lord Gordon said:

"No doubt these conditions provided for a subsequent and formal deed being executed by the parties: but that deed was only for the purpose of more formally setting forth the conditions upon which the parties had agreed. If there was anything introduced into the proposed deed, which the purchaser considered beyond the terms and conditions on which he purchased the property, he would have been entitled to object, and, if necessary, the proper terms of the deed could have been adjusted at the sight of a Court of law."

The facts of that case more nearly approach the facts of this case than the facts of any of the other cases which have been cited to us. There were conditions of sale which were considered to be the terms upon which the lots were offered for sale. It was provided that each purchaser was to sign a contract embodying the conditions and providing for the payment of a deposit. But the facts of this case are very much stronger, as the alleged contract is to be found not in correspondence between the parties but in a document which is in the form of a regular agreement. Each party writes that he has given and taken an agreement to the above effect, that is to say, according to the conditions or terms in the document and not subject to any condition. And there is this further fact that Messrs. Hiralal and Co., by their letter of 1st December certainly considered that the agreement by a vakil was to be drawn up in consonance with the terms of the Gujarati Chitti. If that document was merely the basis for a future agreement, then it would be open to either party to suggest fresh terms as to price and any other matter. Now I turn to the facts in the cases on which the respondent relied. In *Winn* v. *Bull* (2) there was an agreement for a lease of a freehold but subject to the preparation and approval of a formal contract. Jessel, M. R., said:

"The plaintiff says in effect, 'I agree to grant you a lease on certain terms, but subject to something else being approved.' He does not say: 'Nothing more shall be required' . . . but 'something else is required' . . . That being so, the agreement is uncertain in its terms."

In *Lloyd* v. *Nowell* (3) the defendant wrote:

"subject to the preparation by my solicitors and completion of a formal contract, I am willing to sell to you the lease, etc."

Kekewich, J., said:

"I cannot myself get out of the plain meaning of the words: 'I am willing to sell, not absolutely, but subject to the preparation by my solicitor,

(2) [1877] 7 Ch. D. 29.
(3) [1895] 2 Ch. D. 744.

and completion, of a formal contract' . . . That provision seems to me to go to the root of the contract."

In *Watson* v. *McAllum* (4) the letter ran:

"We agree to sell the above for £ 1, 775 subject to agreement stating fully the conditions being prepared and signed at our office on Monday."

Joyce, J., said:

"What is the effect of the words 'subject to'? They introduced a condition or proviso."

Lastly in *Von Hatzfeldt Wildenburg* v. *Alexander* (5), the case so much relied upon by the learned trial Judge, there was an offer by letter to accept £ 25,000 for the lease of a certain house and a reply by letter accepting 'subject to the following conditions,' and one condition was that the buyer approved her surveyors' report, on the structure, and drainge, etc., another was that the buyer's solicitors should approve of the title and the form of contract. The plaintiff did not approve of her surveyors' report, and the defendant withdrew the offer to sell. It will be seen, therefore that in all these cases the words 'subject to' were used and it was held that they imported a condition or proviso. I may also refer to the decision of Jessel, M. R. in *Crossley* v. *Maycock* (6) where the learned Judge said:

"The principle which governs these cases is plain. If there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into some more formal terms the mere reference to such a proposal will not prevent the Court from enforcing the final agreement so arrived at."

Lastly the Remarks of Spankie, J, in *Whymper* v. *Buckle* (7) seem directly in point. The learned Judge said:

"With all this authority before us we may safely conclude that, unless the defendants can show that by mutual consent there was a condition antecedent to a contract, to the effect that there should be no binding agreement until a written contract had been executed by the parties or that the assent communicated in their letter of 20th December 1887, was subject to the provision as to a written contract, then assuming that any agreement has been proved, that agreement would be binding upon the parties. The case therefore must stand or fall to pieces on the evidence."

To say that the words "the conditions thereof are as follows," appearing in a document which has all the appearance of a final agreement import that all that follows constitutes conditions antecedent to a contract is begging the question. An agreement having been executed, the defendant has to show that it was not to take effect until certain conditions precedent had been fulfilled. It has been argued that some dispute might arise when drawing up the clause in the formal agreement corresponding to condition 4 in Ex. A. Now to my mind that clause is perfectly clear. If the pending suits are not disposed of within six months. the agreement is to remain in force until they are disposed of. Disposal must mean final disposal. It could not be read into the clause that if the defendant got a decision in his favour in the first Court, the plaintiff would be bound to purchase without regard to the chance of the decision in the first Court being reversed on appeal. But the fact that a dispute might arise in drafting the formal agreement was considered by Lord Gordon in *Rossitter* v. *Miller* (1), in the passage I have referred to above and cannot in any way affect the question we have to determine, unless the defendant can show that the condition in Cl. 4 is so uncertain that it is patent that no agreement was arrived at and that the parties intended that the actual agreement. should be settled thereafter when the bargain paper was executed. But that has not been shown, the question raised by the defendant's solicitors whether the defendant's agreement was passing to and fro between the parties is no longer of any importance as we have been told the suits have been settled and the defendants are free to convey, but as long as the suits were pending there would have been no difficulty that I can see in the event of disputes arising over the terms of the agreement in getting them or any others adjusted by the Court.

In my opinion therefore there was a binding agreement on 28th November 1917 and the plaintiff is entitled to specific performance. On the issues 1, I do not understand the form of the issue 1 and I think it should be struck out. On issue 2 I should say there was a concluded contract the terms of which are to be found in Ex A. I would answer issue 3 in the negative, issue 4 in the affirmative, and issue 5 in the affirmative. The result is that the appeal

(4) [1902] 87 L. T. 547.
(5) [1912] 1 Ch. 284.
(6) [1874] 18 Eq. 180.
(7) [1881] 3 All. 469.

must be allowed and the plaintiff's claim decreed with costs in both Courts.

**Heaton, J.**—I concur.

G.P./R.K. *Appeal allowed.*

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## * A. I. R. 1919 Bombay 44

SCOTT, C. J. AND SHAH, J.

*Shridhar Madhavrao Dhopaokar* and *others*—Plaintiffs—Appellants.

v.

*Ganpati Punja Godse* and *others*—Defendants—Respondents.

Second Appeal No. 167 of 1916, Decided on 18th November 1918, against decision of First Class Sub-Judge, Nasik, in Appeal No. 1 of 1914.

*** Civil P. C. (5 of 1908), O. 21, R. 95—Suit against judgment-debtor in possession for possession of immovable property purchased in execution on last day of 12 years from receipt of possession—Noncompliance with provisions of R. 95 held barred suit—Lim. Act (9 of 1908), Art. 144.**

In a suit for possession of certain immovable property filed on 3rd July 1913, the plaintiffs alleged that their father had purchased the property at an auction-sale, and that a receipt for possession was given to the bailiff on 3rd July 1901. It was found that the property had all along been in the possession of the defendants who were not disturbed in their possession on the date of the receipt:

*Held*: that the provisions of O. 21, R. 95 not having been complied with, the suit was barred by time. [P 44 C 1, 2]

*M. V. Bhat*—for Appellants.

*Y. N. Nadkarni*—for Respondents.

**Scott, C. J.**—In this suit which was filed on 3rd July 1913, the plaintiffs alleged that in execution of a decree in a suit of 1890 their father purchased the plaintiff property at an auction-sale and a receipt for possession was given by the plaintiffs to the bailiff on 3rd July 1901. This suit is for possession; it is filed exactly on the day the twelfth year expires. Both Courts have held that the cultivable land and the house, which are the subject of the suit, were on 3rd July 1901 and had for some time previously been in the possession of defendants 1 to 3 and that defendants 1 to 3 were not disturbed in their possession on the date of the receipt, but that statements were made in it both by the plaintiffs and by the bailiff as to possession having been given to the plaintiffs, which were entirely false. O. 21, R. 95, of the Code provides that:

"where the immovable property sold is in the occupancy of the judgment-debtor or of some person on his behalf . . . and a certificate in respect thereof has been granted under R. 94, the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser, or any person whom he may appoint to receive delivery on his behalf in possession of the property, and if need be, by removing any person who refuses to vacate the same."

The form prescribed for the warrant to the bailiff is given in Appendix E, No. 29, and runs as follows:

"Whereas . . . has become the certified purchaser of . . . at a sale in execution of decree in suit No. . . of 19 . . . you are hereby ordered to put the said . . . the certified purchaser, as aforesaid in possession of the same."

It is clear therefore that the provisions of the Civil Procedure Code have not been complied with. It is however argued that there has been what is called symbolical possession, and it is contended that the provisions of the Code, as interpreted in *Mahadeo Sakharam* v. *Janu Namji Hatley* (1), may be disregarded in consequence of a decision in the Privy Council in *Radha Krishna* v. *Ram Bahadur* (2). There, according to the judgment of the Judicial Committee, a sale took place and the mortgagees were the purchasers. They received a sale certificate that they were entitled to all the zamindari rights in 8 annas pucca of Mauza Nagdah, and the land being in occupation of cultivating tenants under an apparently bona fide title, they received formal possession as usual after due proclamation by beat of drum in 1898. That was therefore a case falling under S. 319, Civil P. C., 1882, which provides that

"when the property sold is in the occupancy of a tenant or other person entitled to occupy the same, and a certificate in respect thereof has been granted under S. 316, the Court shall order delivery thereof to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or in such other mode as may be customary, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser."

The difficulty supposed to be created by the Privy Council judgment is due to reference in the concluding paragraph to a Full Bench decision of the Calcutta High Court in *Juggobandhu Mukerjee* v. *Ram Chunder Bysack* (3), in which it was said that symbolical possession availed to dispossess the defendants sufficiently, because they were parties to the proceedings in which it was ordered and given and their Lordships observed that there was no reason to question it

(1) [1912] 36 Bom. 373=14 I. C. 447 (F.B.).
(2) A. I. R. 1917 P. C. 197=43 I. C. 268 (P.C.).
(3) [1880] 5 Cal. 584=5 C. L. R. 548 (F.B.).

or to hold that the rule of procedure should be altered. In the Calcutta case it was said that where land was in the occupation of the defendant, delivery must be by placing the plaintiff in direct possession under S. 223 of the Code, of 1859, but where it was in the occupation of raiyats the decree awarding possession to the plaintiff as against the defendant (not in actual occupation) could only be enforced by proclamation and as in contemplation of law both parties must be considered as being present at the time when the delivery is made. The delivery thus given by proclamation must be deemed equivalent to actual possession. This would be so only under S. 224 of the Code, of 1859, corresponding with S. 264 of the Code of 1882 and O. 21, R. 36 of the present Code or S. 319 and O. 21, R. 96, dealing with the case of delivery to a purchaser at a Court sale of land in occupation of tenants. The present case however falls under S. 318 of the Code, of 1882 which is re-enacted in O. 21, R. 95. We affirm the decree and dismiss the appeal with costs.

G.P./R.K. *Appeal dismissed.*

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## A. I. R. 1919 Bombay 45

BATCHELOR, AG. C. J. AND KEMP, J.

*Yamunabai Narayan Chitnis*—Appellant.

v.

*Lagmanna Basanna Kurani*—Respondent.

First Appeal No. 46 of 1915, Decided on 12th February 1918, against decision of First Class Sub-Judge, Belgaum, in Suit No. 101 of 1913.

**(a) Grant — Service inam — Resumption—Grant partly for past and partly for future service is resumable on wilful default.**

Where lands are granted on account partly of services already rendered and partly of services to be rendered in the future, the grantor is entitled to resume the lands by reason of the wilful default of the grantee in the service which was a condition precedent to his enjoyment of the lands. [P 48 C 1, P 47 C 2]

**(b) Adverse Possession — Landlord and tenant—During tenancy landlord is not affected by adverse possession, but where act is open he is so affected—What acts operate against him stated.**

Ordinarily, during the currency of a lease, no adverse possession can be obtained by a third party against the landlord, but it is otherwise where, to the knowledge of the landlord his tenants are ejected by a stranger after open conflict with him, and the new tenants pay their rents to the stranger. In such a case the landlord's rights are openly invaded and his rights openly challenged and jeopardized and adverse possession begins to run against him. [P 49 C 1]

*Setalvad* and *S. R. Bakhale*—for Appellant.

*Coyaji* and *S. S. Patkar*—for Respondent.

**Batchelor, Ag. C. J.**—This is an appeal from a judgment and decree of the First Class Subordinate Judge of Belgaum, Mr. Koppikar. The suit was brought for possession of certain lands with mesne profits. The original defendants 1 to 24 were tenants in occupation of the lands in suit, but the real combatant defendant was defendant 25, who is the Sar Desai of Vantmuri. The history of the litigation is set out in the learned Subordinate Judge's judgment, but it will be convenient to refer to a few of the more important facts now in order to bring them into early prominence. It is admitted that the original owner of the lands in suit was the Desai, the predecessor of the present defendant 25, to whom I shall in future allude as "the defendant". So early as 1774 A. D. his ancestors made a grant of these lands to the plaintiff's ancestors by the sanad, Ex. 201. A pedigree of the plaintiff's family, so far as we are concerned with it, will be found in the Subordinate Judge's judgment. The plaintiff's ancestors acted as Chitnis and storekeeper for the Desai, but in 1843 the right of service as storekeeper was discriminated from the service as Chitnis, and went to another branch of the family. We are not further concerned with any rights connected with the service as storekeeper. The office of Chitnis remained with the plaintiff's family together with the lands in suit. In the genealogy appearing in the lower Court's judgment, it may be observed that Nilkanth, Gopal and Balkrishna were adopted sons, and their adoptions were in each case duly recognized by the Desai. Balkrishna left no son, and his widow Sundrabai was unable to serve as Chitnis. The Desai therefore allocated the lands and the appurtenant cash remuneration to other persons whom he temporarily employed to discharge the duties of the office. In November 1879 Sundrabai mortgaged the lands to the Desai for a sum of Rs. 2,500 and the Desai was put in possession. In 1881 Sundrabai adopted Narayan, who

attained majority in 1889, and died either in 1902 or 1903, according to the plaintiff's version. In August 1889 Narayan, after reaching his majority, redeemed the mortgage, and the instrument, Ex. 56, bears upon it an endorsement of satisfaction. In October 1889 Narayan purported to let out the lands under kabuliyats to six tenants. These kabuliyats, which are Exs. 179 to 184, are for a term of twelve years, and would therefore expire in 1901. The six tenants however proved recalcitrant, and Narayan was unable to obtain from them any payment of their rents. He therefore filed suits against them, and in those suits obtained decrees for the rents of the years 1890 and 1891. The rents of those years were actually recovered from those tenants by Narayan. In 1894 Narayan brought other suits for the rents of 1892-93 against the six original tenants, and certain other persons who had been put in occupation as tenants by the Desai. In 1896 Narayan obtained from the Court a decree in the suit of 1894, but admittedly he never succeeded in getting that decree executed, and admittedly he nevermore recovered any rents in respect of these lands. In other words, after this struggle with the Desai, in 1889 he abandoned the matter and acquiesced in the Desai's position.

The facts which I have above set out are, I believe, not in dispute between the parties. The learned Judge below raised two principal issues, one of them dealing with the true construction of the sanad, Ex. 201, and the other raising the question whether the Desai had a defence to the plaintiff's suit on the ground of his adverse possession. As to the construction of the sanad the learned Judge found in favour of the plaintiff, but finding that the Desai had proved adverse possession for a period exceeding twelve years, he on this ground dismissed the suit. The judgment, as is invariably the case with Mr. Koppikar's judgments, is a careful document, and for my own part, I agree with the learned Judge below in all that he says as to the questions of fact in this suit, and those questions of fact are, in my opinion, all important. I differ from Mr. Koppikar as to the construction of the sanad, but nonetheless I desire to say that my judgment is largely based upon my own view as to the facts of the case and if I am right as to those facts, it seems to me that there can be no doubt either of the justice or of the propriety of the decree under appeal. No doubt at first it seems a plausible thing to say that a Court should be loath to defeat the grant of 1774 by reason of adverse possession on the part of the grantor's successor, but if broad propositions of this kind are to go for anything the case may be put even more favourably for the defendant For, whereas as I read this sanad, the lands were granted in consideration of service, the plaintiff in this suit seeks to dispossess the defendant and claims the lands absolutely, repudiating any obligation to serve, and denying that the defendant Desai has any interest in the property. Upon this point it may be well to notice at once that the Desai's position is in my view neither extravagant nor oppressive; and he says in his deposition, which appears to me to be a candid and truthful statement.

"If service is rendered, then only the lands in suit are to be held by the plaintiff's family from generation to generation. If they refuse to render the service I have the right of resuming the lands. I have also that right if they deny my title as owner."

Now it is an admitted fact that at least for ten years the defendant Desai has been in exclusive occupation and enjoyment of these lands, and throughout that time the plaintiff's family have acquiesced in that position. Now after the lapse of this prolonged period this Hindu lady, acting through her agent, her brother, sues to oust the defendant. With these preliminary observations, I go now to the first question to be answered. What its the true meaning of the sanad, Ex. 201? That document runs as follows:

"To Rajeshri Narayan Jivaji Chitnis and Kotnis belonging to Gotra Kashyapa Sutra Ashvalayan. Salutations and request of friend Basavaprabhu walad Lakhamgowda Desai, Nadgowda, Pargane Hukkeri, Sar Desai of several Mahals and Nadgowda Mamle Murtujabad. The Sooryear Khamas, Sabain, Maya Alaf 1175 (i. e., 1774 A. D.) Vritti Patra given in writing by me is as follows: 'Your father and you have been serving us faithfully since the time of my father. You have been very useful in serving us. You are serving in many ways as Chitnis and as Koti clerk. Thinking that you are a useful person and that you are competent to perform both these services and that it is necessary to grant to you only (that is, exclusively the vritti appertaining to these services and to continue it with you from generation to generation, I have granted to you the vritti appertaining to the services of Chitnis and Kotnis

and the vritti appertaining to service in respect of the management of the koti. The emoluments granted in your favour in respect of these two services are as particulars mentioned below."

Then after setting out the particulars, the document concludes:—

"I have granted you in inam as above, Rupees four hundred as emoluments in cash and the said Kamat lands in respect of both services. And I have settled and granted you the Kaulavani of the aforesaid Pargane and Kanu (rights) in respect of sanads, etc. You, your sons, grandsons and other descendants from generation to generation are to go on enjoying the above property, and you and your descendants from generation to generation are to perform both the services and live happily. There is no reason for anyone to cause obstruction. May this be known.

Mr. Setalvad for the plaintiff has urged that upon a true reading of this document there is a sharp distinction between the cash which is to be the remuneration for future services, and the lands which according to the learned counsel, are granted in exchange for services already rendered. But upon carefully attending to the language of the document, I feel sure that the vernacular words cannot bear the weight of any such distinction. It is quite true that the word "vetan" remuneration, occurs after the word "cash", but that after all is the place where one would expect to find it, and if the document be read as a whole it seems to me impossible to deny the force of the constant occurrence together of the cash and the lands, and the constant bracketing and coupling of the services already rendered with the services to be rendered in future as constituting jointly the integral consideration for the grant. The thing itself is more than once called a vritti, and that word is defined in Molesworth's Dictionary as meaning any office, situation or business, senses which are familiar to the Courts in connexion with this particular word. If reference be made to Exs. 202, 242, 203 and 459, it will, I think, be seen that the sense which I am attributing to the instrument is the sense which the parties to it have always accepted. In Ex. 202, for instance, which is a letter from the Desai to Nilkanth, we have the following passages:

"The deceased Rudropant had no issue. He therefore took you in adoption. As to that, you requested that the adoption should be confirmed by (us) the Sarkar. On a consideration thereof it appears to us that the fact of your having been adopted by Rudropant is true. Your adoption is therefore confirmed and you are made owner to his vritti. Therefore the land, haks and kanubabs and the kaulavni, etc., in the several villages appertaining to the said chitnishi vritti acquired by and continued from your ancestors . . . are granted. The whole land including the above and haks, kanubabs and emoluments in respect of writing as continued from ancient times, you should enjoy and you should do your own writing work in respect of chitnishi and by enjoying the lands, etc., as mentioned above you should faithfully perform the service of the Sarkar."

In Ex. 242, which is a letter to the Desai from Nilkanth, we find the following language:

"You the Sarkar have now made me the owner of the Vritti of Rudropant and granted a sanad in my favour to the effect that I should manage the work of writing in respect of Chitnishi and in respect of the Jamabandi of the several villages and go on enjoying the property . . . I shall accordingly enjoy the said Vritti and perform the two duties of writing and live honestly and loyally in the service of the Sarkar."

These documents, if their assistance is needed, seem to me to confirm the meaning which I am attributing to Ex. 202, that is to say, they seem to support the construction that the lands in question and the cash allowance are granted, to use the language of the Privy Council, *pro servitis impensis et impendendis* that is, on account partly of services already rendered and partly of services to be rendered in the future. In other words, as I read the sanad, the continued performance of the service, is upon the true construction of the grant, the condition on which the lands are to be held, and if that is so, then according to the Privy Council's decision in *Forbes* v. *Meer Mahomed Tuquee* (1), the lands may unquestionably be resumed for wilful default. The decision which I have just cited was considered by Sir Lawrence Jenkins in *Lakhamgavda* v. *Keshav Annaji* (2), but I cannot concede that the judgment of the Chief Justice affords any support to the plaintiff's case in our present circumstances. All that was laid down there was that, where the grant is a grant in consideration of past and future services, as here, and where as here is no express provision in the grant that the interest in the lands should cease when the services are no longer required, the lands held under the grant are not resumable at will. But then that is not the defendant's case. He claims to be able to resume the lands not at will, but by reason of the wilful default in the service which was a con-

(1) [1869] 13 M. I. A. 438=2 Sar. 588 (P. C.).
(2) [1904] 28 Bom. 305.

dition precedent to the enjoyment of the lands.

That there was a wilful default cannot I think, be questioned. The mortgage of 1879 was made by Sundrabai to the Desai when the latter was an infant and at that time the managers of the Sansthan were the Desai's mother assisted, if one should say assisted, by a person named Bhau Ramchandra. This Bhau Ramchandra is found upon the evidence to have been related to the family of Sundrabai, and it is enough to say that ultimately he had to be removed for mismanagement of the estate. In 1885 the Desai attained majority, and in 1819 the mortgage money was paid to him. It is important however to observe that the endorsement on Ex. 56 recites that the deed is given back. It does not recite that possession of the lands was delivered to Narayan, and the Desai, whom I believe, has sworn that possession of the lands was not delivered. It is true that on the day before the redemption Narayan made the statement, Ex. 462, upon which Mr. Setalvad has placed reliance. But it cannot, I think, be effectively argued from this statement that Narayan genuinely professed an honest willingness to continue the service as Chitnis. The statement is very much in the form of a self-serving petition, the object being that his name should be entered in the accounts of the Sansthan, and he says that

"nazrana in respect of adoption and the heirship inquiry has already been given by Sundrabai according to the custom of the Sansthan."

The statement appears to have been made in the Kutcheri of the Sansthan in the presence of some representative of the Desai, and it would seem that Narayan's attention was called to the fact that no record was discoverable showing that nazrana had been paid in respect of the adoption.

"We were asked" therefore, he says, "to state whether or not we are now willing to pay nazrana in respect of the sanctioning of the adoption. As to this I beg to state that at present my family is in straitened circumstances as debts etc., have been incurred. I am therefore willing to act up to any order that may graciously be passed and to pay now only whatever amount, etc., that may be found due this day to the Sansthan and to render service, etc."

That, no doubt, so far as words go, is a profession of willingnes to serve, but as it seems to me, a profession of willingness to serve on terms which were Narayan's and were not the Desai's. Admittedly however Narayan never served, and though the Desai's books were put in evidence in the Court below, it is not suggested that any nazrana was ever paid by Narayan, nor is it alleged that the adoption of Narayan was ever recognized by the Desai. The Desai himself, in his statement made on 21st January 1894, Ex. 200, explains what happened in these words:

"The opponent (i. e., Narayan) had been told to perform service. He did not perform it. He absconded. The order to perform service had been made orally. The remuneration for service had been settled previously, that is, before the vahivat came into my hands. After the administration came into my hands he was told to join service. He absconded."

It is indeed clear upon this record not only that Narayan failed to offer himself for service on the terms that the Desai could approve, but that he lost no time in putting himself in a position of irreconcilable hostility against the Desai whose tenants he sought to estrange. In his deposition in the present suit the defendant speaks as follows on the present point:

"On the satisfaction of the mortgage, I told the plaintiff's husband that if he was not able to render the service, that he might appoint somebody to do it and learn the work under him and promised to deliver the lands if he did so. He did not appear to render the service and did not depute anyone for the purpose."

So much as to the position occupied by Narayan. But what concerns us more intimately is the position of the plaintiff herself, and that is disclosed in no uncertain terms in the early paragraphs of the plaint. In para. 1, after setting out the lands in suit, she goes on:

"The said lands have been continuing as pot inam from ancient times with the plaintiff's family from the ancestors of defendant 25, the khatedar, and are of the full ownership of the plaintiff."

And in para 3 she says:

"that the plaintiff's husband Narayan Balkrishna recently died, and that she herself, the plaintiff, is his only heir."

I conclude therefore that in this case there has been not only a wilful default to render the services which were the conditions precedent to the enjoyment of the lands, but the present suit is based upon an open disavowal and repudiation of the defendant's interest in the property. It appears to me therefore that on the terms of the sanad the defendant was, and is, entitled to resume the lands. Next it remains to

deal with the question of possession. In the first place it is essential for the plaintiff not only to prove her title, but to show that within twelve years next proceding the suit she had possession of the land: see the Privy Council's decision in *Dharani Kanta Lahiri* v. *Gabar Ali Khan* (3). Well if that is the burden lying upon the plaintiff it appears to me that a complete answer to the suit is the fact that certainly during the twelve years preceding the suit the possession of this property was with the defendant and not with the plaintiff. This fact is clearly proved, and so far as I have understood the arguments, is not contested by the appellant. I need not therefore labour the point, but will say that to me it is plain upon the record that at least ever since 1893 the defendant has sole possession in his own right, that his tenants have been in occupation and that through them he has received all the rents and profits of the lands and has received them to the knowledge of the plaintiff and her predecessor.

Upon the question whether the defendant's possession can be regarded throughout as adverse or not the appellant relies upon the twelve-year rent notes obtained by Narayan in 1889, and the argument has been that the possession of the Desai could not be adverse as against Narayan until those leases had expired in 1901. Unfortunately for that argument the learned Judge below has found that the kabuliyats and rent notes in question are not honest documents but were obtained by Narayan in collusion with the tenants and in fraud of the Desai. That finding is fully explained in the last paragraph of the Subordinate Judge's judgment and I need not say more than that I agree with the reasoning there employed. It is notorious that Indian peasants are ready enough to pass such rent notes to anyone, the peasant's sole desire being to be allowed to stay on the land which he occupies. As to Mr. Setalvad's contention that this young man would not have been able to collude with the tenants to the detriment of the powerful Desai, the answer appears to me to be extremely simple for I think that any misrepresentation made by Narayan would have produced the desired effect as for instance, if Narayan had told the tenants that his adoption had been sanctioned by the Desai. We are however without any evidence as to what precisely happened so that all this is a matter of speculation. I wish only to say that the theory that Narayan colluded with the tenants is not in my opinion exposed to the slightest difficulty on the ground of actual practice. I should add that I myself feel quite sure that in October 1889 and in the events that had by then happened, Narayan certainly did not suppose that he was honestly entitled to take these rent notes from the tenants, or to obtrude himself into the position of the landlord. I think his object was as is not infrequent in such cases, merely to create documentary evidence to assist him in the future.

But then it was said that the Desai's own accounts from 1891 to 1911 indicate that in his opinion these lands were still held by the plaintiff as remuneration for the Chitnis service. We have been carefully taken through all these entries by the learned counsel; and though at first sight they seem to raise a difficulty in the defendant's way, that difficulty is, I think dispelled by a little consideration. In the first place, ever since 1889 it is indisputable that the Desai has been in open hostility to the plaintiff, openly claiming that the lands had been resumed because there had been default in the service. It is unlikely therefore that he would make himself, or ever authorize any agent to make, account entries which are flagrantly in contradiction with his own sustained action. The explanation however is not far to seek. In the first place it is noteworthy that this point is not referred to in the long and elaborate judgment of Mr. Koppikar, so that I must infer that at the trial the plaintiff felt that no importance could attach to it. It was reserved for the Court of appeal. That is the more unfortunate, because both the Desai himself and his karbhari were examined at the trial, and if any point were to be made by the plaintiff of the Desai's account books it was in my opinion manifestly essential that that point should be put either to the Desai or to his karbhari or both in order to afford them an opportunity of giving a reply. As I say, no such opportunity was afforded and the point was reserved for the Court of appeal after all the evidence had been finally closed. Even here however it so happens that the matter is not difficult. I fully ac-

(3) [1913] 18 I. C. 17 (P. C.).

cept Mr. Coyaji's explanation, which is that as a matter of accounts these lands were in the Desai's office earmarked or allocated to the Chitnisi office, and have never yet been formally dissociated from that office. The entries therefore would be continued to be made by the clerks in the ordinary routine, and Mr. Coyaji has stated without contradiction that even after the Desai's written statement was filed in this suit, the entries continued to be made as before. It seems to me therefore that no use can be made of these entries in contradiction of the clear attitude which the Desai has preserved since 1889. If then the learned Judge below is right, as I think he is right, in finding that the rent notes were collusive, there also is an end of the plaintiff's case, for it cannot be that the plaintiff's position is improved by reason of the collusion of her predecessor-in-title.

Lastly, I will shortly state my opinion upon the assumption that Mr. Koppikar and I are wrong in regarding the kabuliyats as collusive. Even so, I do not think that the result would be different. There is no need to cast any doubt upon the general proposition that ordinarily during the currency of a lease no adverse possession can be obtained by a third party against the landlord, seeing that the landlord is not usually entitled to resume possession until the expiry of the lease. But as Batty, J.'s elaborate judgment in *Tarubai* v. *Venkatrao* (4) shows, this broad proposition is subject to qualification and reserve. At p. 57 of the report the learned Judge observes:

"In the case of landlord and tenant, the mere ouster of the tenant was shown to be insufficient so to affect the landlord as to put him to the necessity of vindicating his position. But when the landlord was entitled to rent and the rent was not merely left unpaid (a fact which would give the real owner no unmistakeable notice of his rights being infringed), but was actually refused and paid to another person, then there would be such virtual dispossession of the rightful owner as to put him to his remedy."

Now here the facts are exceptionally strong against Narayan and the plaintiff. To their knowledge, their tenants are ejected by the Desai after open conflict with him, and ever since 1893, these new tenants of their enemy pay their rents to the Desai. It is, I think, upon these facts not possible to resist the conclusion that Narayan's alleged rights were openly invaded, and his alleged title was openly challenged and jeopardised by the Desai. It follows therefore in the words of Batty, J., that he was put to his remedy against the Desai, whose acts manifestly assailed his own position and not merely the position of the tenants.

I have already observed that after the payment of the mortgage money, though the mortgage bond was handed back, the lands were not delivered. I may now add that Narayan's successful suits of 1892 and 1894 were brought against the tenants only, and that the Desai was no party to them. The judgments in Narayan's favour proceed merely on the execution of the kabuliyats by the tenants, and not on any finding that Narayan had made over actual possession of the lands to the tenants. Moreover the Desai not being a party, the Courts neither did nor could consider the question of actual possession, as that question arose between Narayan and the Desai. But upon this question we have in the present suit very notable admissions. The plaintiff's own brother and agent who is conducting this suit on her behalf Keshav Sheshgiri, Ex. 194, says in cross-examination:

"I am not prepared to swear that the lands were not granted as remuneration for service. I do not know if plaintiff's ancestors did or did not render service to the family of defendant 25. Defendant 25 has been in possession of the plaint lands for the last 10 or 15 years, and enjoying the profits wrongfully. Plaintiff's husband last recovered the rent of the plaint lands in 1891-92, but not afterwards. Defendant 25 recovered rents subsequent to 1891-92. In 1892-93 defendant set up title as owner and claimed to be in possession and refused to part with it."

Then Balvant Daso, Ex. 206, a witness for the plaintiff and a person who bears no good-will towards the Desai, says in cross-examination:

"I cannot say from what tenants defendant 25 has been taking kabuliyats in respect of Subraya's portion since the miscellaneous proceedings of 1892-93. Since 1895 defendant 25 has been recovering the rent of Subraya's portion of the plaint lands."

And the plaintiff's witness Nilappa Ningappa, Ex. 219, speaks to much the same effect. "I do not remember," he says:

"how long the tenants of defendant 25 have been occupying the plaint lands. It may be 20 or 22 years. They have been paying the rent to defendant 25 and they told me so 7 or 8 years ago. They commenced paying rent to defendant 25 about 20 years ago."

In the face of reluctant admissions of this sort, it seems to me that the Court is bound to belive the otherwise credible

(4) [1903] 27 Bom. 43.

and respectable testimony of the Desai, Ex. 199, when he says:

"I did not deliver possession of the lands after satisfaction of the mortgage. I have remained in possession all the time since satisfaction of that mortgage in my capacity as owner."

On this evidence I come to the conclusion that ever since 1893 on any computation the Desai has excluded the plaintiff and her predecessor from possession and enjoyment to their knowledge and in open assertion of his adverse claim. The facts seem to me to be so strong that if Batty, J. and I are right in thinking that in special circumstances adverse possession can run against a landlord during the currency of a lease, I cannot doubt that such possession will run against Narayan in the circumstances of this case even upon the violent assumption that the kabuliyats taken by him from the tenants were not taken collusively and in fraud of the defendant. Upon all these grounds, I am of opinion that the decree of the Court below is right and ought to be affirmed with costs, this appeal being dismissed.

**Kemp, J.**—Plaintiff sues to recover possession as owner of the plaint lands together with mesne profits. Defendant 25 is the Sar Desai of Vantmuri and the plaintiff's claim is based on a sanad granted by the then Desai to one Narayan Jivaji, plaintiff's ancestor, on 24th September 1774 (Ex. 201). Plaintiff's case is that the lands comprised in the sanad were given to her family as a subinam without any condition or power of resumption and that the service of Chitnis or secretary rendered by the members of the plaintiff's family was in consideration of a money payment which used to be made to the family and that the grant was not in consideration of past and future services in that office. Defendant 25 alleges that the subject of the grant was the office and not the lands, that the office used to be remunerated by the income of the lands, that he has the right of dispensing with the service and resuming the lands and that he did both about 1890-91. The other defendants are tenants on the lands in question. In my opinion, it is of little avail to look at the sanads in decided cases to construe the sanad in suit. The construction of a sanad in each case depends on its terms. The present sanad acknowledges the services of the grantee and his father in the capacities of secretary and storekeeper and records that the right of both these services shall be allotted to this grantee and continued to him from generation to generation. The remuneration for these services is detailed as property consisting of lands at Kamatnur and other places and Rs. 200 in cash payable every year with some perquisites for the office of secretary and an equal amount and lands in different villages for the office of storekeeper. The sanad then goes on to say:

"I have granted you in inam as above Rs. 400 as emoluments in cash and the said Kamat lands in respect of both services. And I have settled and granted you the Kaulavani of the aforesaid pargana and Kanu rights in respect of sanads, etc. You, your sons, grandsons and other descendants from generation to generation are to go on enjoying the above property, and you and your desendants from generation to generation are to perform both the services and live happily."

The proper construction of this document seems to me to be grant of an office to be remunerated from cash and lands. I do not agree with the plaintiff's contention that the lands were granted apart from the services, nor with the defendant's contention that he has the right of dispensing with the services and resuming the lands. So long as the grantee and his descendants performed the services, they were entitled to the remuneration of the cash and the lands.

In 1843 a dispute arose between the two branches of the plaintiff's family, which was settled by the Desai allotting to one branch this right of service as storekeeper with the cash and lands pertaining thereto and to the other branch (represented in this case by the plaintiff) the office of Chitnis with the cash and lands relating to that office. Subsequently, the holder in 1843 of the office of Chitnis died without issue and his adopted son Nilkanth, on paying the customary nazrana was recognized by the Desai, who invested him with the office and the lands and perquisites of his adoptive father and enjoined him to the writing work connected with the office of secretary, enjoy the lands etc.. as aforesaid and render the service with devotion. After Nilkanth's death Gopal was recognized as his adopted son invested with all the rights and powers of his ancestors and directed to discharge his duties with devotion. After Gopal his adopted son Balkrishna was recognized on agreeing to pay the custom-

ary nazrana and perform the service : Ex. 459.

On Balkrishna's death, as his widow Sundrabai was unable to perform the service or depute a fit person to do so, the Desai withheld some of the perquisites and applied the proceeds towards the remuneration for the service, which apparently he took from others. In 1881 Sundrabai adopted Narayan, the plaintiff's deceased husband. Narayan made an application on 13th August 1889 to have the perquisites restored as he was willing to serve the Desai. He also prayed that he might be excused the payment of the customary nazrana : Ex. 492. It does not appear that the Desai ever recognized his adoption or accepted his offer of service. Indeed he says that Narayan refused to perform the service which would be a sufficient ground to defeat this suit, for the performance of services was a condition precedent to the enjoyment of the lands. On 25th November 1879 Sundrabai mortgaged the lands with the Desai with possession for Rs. 2,500 : Ex. 56. The Desai was then a minor and did not attain his majority until 1885. On 14th October 1889 Narayan redeemed the mortgage and received back the deed with satisfaction endorsed upon it, but the Desai remained in possession of the lands. The plaintiff contends that Narayan was in possession by virtue of kabuliyats passed by the tenants on 8th October 1889, but these kabuliyats (Exs. 179—184) were obtained from tenants who had come in through the Desai during the currency of the mortgage.

Now it may be that in a grant of this kind, when the last holder of the office dies without issue, the services may be performed by somebody deputed by his widow. In the present case, as Sundrabai was unable to perform the service and did not depute anyone to do it for her, the Desai withheld some of the perquisites and applied the proceeds towards the remuneration for the service from others. Narayan, Sundrabai's adopted son, did not perform the service nor was his adoption recognized by the Desai. What however we are concerned with in the present case is that the plaintiff, who is Narayan's only heir, claims the lands as owner, and I am of opinion that having regard to my construction of the terms of the sanad her claim as owner must fail. Where the office is alive and involves the continuous performance of the duties, I think she can only claim the remuneration from, as distinct from the ownership of, the lands if she depute somebody acceptable to the Desai to perform the services. But her suit claiming the property absolutely must fail.

Then it is shown the Desai was in possession in 1902 The plain was filed on 21st December 1912. In order to succeed the plaintiff here must show not only title against the defendant, but that she was dispossessed within twelve years of suit [*Dharani Kanta Lahiri* v. *Gobar Ali Khan* (3)] : this she cannot do. Narayan died in 1902-03. Even if the kabuliyats passed to Narayan in October 1889 by the six tenants who were put in by the Desai during the mortgage be considered as bona fide, it is proved that all six tenants had been ejected by the Desai, who was in possession through his tenants for more than 12 years before the suit.

But I question whether Narayan really ever secured possession after the mortgage. The six tenants had passed kabuliyats to the Desai during the mortgage: when it was paid off the then existing kabuliyats had not expired, and before their expiry Narayan purported to secure these tenants as his tenants. The period of those kabuliyats was twelve years and it is improbable that the Desai, who all along contested Narayan's right, would give over possession as alleged. It is a matter of common knowledge that it is an easy matter to secure a kabuliyat from a tenant of this class. Such a kabuliyat is not therefore of high probative value. It is true Narayan obtained decrees for rent up to 1891 but to those suits the Desai was not a party and they cannot therefore be taken as evidence of possession against him. Then it is contended that the entries in the Desai's account books show that he admitted the land belonged to Narayan and that he did not really set up an adverse title as against him. I do not think much value can be attached to the contents of these entries because it is shown that entries continue in this form right up to the filing of the accounts and, even if the Desai knew of the form of these entries and that they would be used as evidence against him, they cannot affect the legal rights of the parties as established by the

clear words of the sanad. If the plaintiff says that the desai waived the right of service, the answer to that is that is not the plaintiff's suit. I therefore think the suit fails and the appeal should be dismissed with costs.

G.P./R.K. *Appeal dismissed.*

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## * A. I. R. 1919 Bombay 53

SHAH, J.

*on difference between*

HEATON AND PRATT, JJ.

*Vasudev Vishnu Hasabnis*—Defendant—Appellant.

v.

*Gopal Parashram Kulkarni*—Plaintiff—Respondent.

Second Appeal No. 358 of 1917, Decided on 27th January 1919, from decision of Dist. Judge, Satara, in Misc. Appeal No. 7 of 1916.

*** Limitation Act (9 of 1908), Arts. 181 and 182—Decree for redemption—Time to pay granted—On default mortgage to apply for sale—Neither party taking any steps for eight years—Mortgagor decree-holder's assignee applied to be allowed to pay money and recover property—Application if for extension of time held barred under Art. 181—Time fixed by Limitation Act cannot be extended—Application if for recovery of property, it was execution application and barred under Art. 182.**

On 7th January 1907 the plaintiff obtained a decree in a redemption suit directing him to pay a certain sum of money within six months and recover possession of the property. The decree also provided that in the event of the plaintiff making default, defendant 1 could apply for relief under S. 15-B of the Dekkhan Agriculturists' Relief Act. Neither party took steps to execute the decree, and in 1915 the rights under the decree were assigned to the present respondent who, as representing the plaintiff, made an application on 27th September 1915 requesting the Court to allow him to pay the money which the plaintiff was required to pay and to get possession of the property under the decree. The application was allowed by the Courts below, and the defendant appealed to the High Court:

*Held*: (1) that treating the application as one to extend time for the payment of the mortgage-debt, it was barred under Art. 181; (2) that the right to apply for such extension did not accrue from day to day, and although a Court had power to enlarge the time fixed under the decree, it had no power to enlarge the time fixed by the Limitation Act; (3) that if the application be treated as one for the recovery of possession of the property, it was an application for the execution of the decree, and as such it was time barred under Art. 182. [P 55 C 1, 2]

*Coyajee* and *S. Y. Abhyankar*—for Appellant.

*K. H. Kelkar*—for Respondent.

**Heaton, J.**—The application with which we are here concerned comes within the words of Art. 181 of the Schedule to the Limitation Act. The right to pay the mortgage money accrued at the latest on the last day for payment allowed by the decree, and this was 17th July 1907. The present application was presented in 1915, much more than three years later, and so is time barred. That is how the matter appears to me. It is suggested that this application was made during the pendency of a suit, and being appropriate to what was in progress or pending is not affected by any bar of limitation. The right to apply was in fact a recurring right. As I understand the matter, there was not a pending suit. No doubt the suit might in a sense be regarded as pending so long as only a preliminary decree had been passed and a final decree was still possible. But even before the end of 1910, three years after the date fixed for payment, a final decree had become impossible, an application for a final decree having become time barred to both parties. Therefore as it seems to me there was not a pending suit, and the application we have here to deal with was time barred.

My learned brother is not of this opinion. I concur with him that we may fairly treat the application as one for extension of time, and that if it is not time barred, the order should be as he suggests. We both agree that if the application is time barred, the matter should be remanded so that the Court below may consider whether the application should be treated as a suit under S. 47, Cl. (2) of the Civil P. C.

The point of law we refer to a third Judge (S. 98) is this: Is the application, or is it not, time barred under Art. 181 of the Schedule to the Limitation Act, the application being regarded as one to extend time for the payment of the mortgage debt?

**Pratt, J.**—The plaintiff in this suit was the mortgagor, and obtained a redemption decree against the defendant, his mortgagee, under S. 15-B, Dekkhan Agriculturists' Relief Act, on 17th January 1907. He failed to pay within the time limited by the decree but as the mortgagee made no application for sale of the mortgaged property, the equity of redemption remained with the plaintiff. In 1915 he assigned that equity to the present respondent, who paid the decretal sum into Court and applied for pos-

session. The Subordinate Judge awarded possession but gave no reasons for his order. In first appeal the District Judge confirmed the order mainly on the ground that it had been decided on the case of *Balaji* v. *Datto* (1), that the Court had power under S. 15-B to allow payment of instalments at any time irrespective of limitation and that therefore it was competent to the Court to allow payment at any time in one lump sum. The reasoning of the District Judge is, of course, unsound for the dictum of Chandavarkar, J., in *Balaji* v. *Datto* (1) assumed that there was an execution proceeding pending. In my opinion, the application should have been treated as one made for enlargement of time to be followed by an order for execution of the decree, as was done in the case of *Ishwar Lingo* v. *Gopal Jivaji* (2)

Mr. Coyaji contends that the application for enlargement of time is itself an application for execution and is therefore barred by Art. 182, and refers to the case of *Amolak Chand Parak* v. *Sharat Chandra Mukherjee* (3), In that case it was held that an application for an order absolute under S. 89, T. P. Act, was an application to enforce the decree made under S. 88 and therefore fell within the scope of Art. 183. But the learned Chief Justice was careful to point out that under the present Civil Procedure Code, applications for a decree absolute though aplications under the Civil Procedure Code are not applications for execution but are governed by Art. 181. Of course it may be contended that applications for an order absolute under S. 15-B are applications for execution as the decree under S. 15-B, Dekkhan Agriculturists Relief Act, is a final decree. In my opinion, the question turns upon the form of the decree. The final order for realization may be embodied in the preliminary order for payment under S. 15-B (3) or substituted for it under S. 15-B (4) and then the decree is final. If not, the decree is preliminary. S. 15-B is supplemental to the general law and the order for sale in S. 15-B (2) should now, I think, be construed as equivalent to a decree for sale.

But, however that may be, it seems to me quite clear that applications to enlarge the time limited in the decree are not applications for execution, for their purpose is not to enforce the decree but to modify it. Nor do I think such an application is governed by Art. 181 or is subject to the law of limitation. The right to apply for enlargement of time accrues from day to day so long as the equity of redemption remains with the applicant : *Nandram* v. *Babaj* (4). The lower Court was therefore competent to make the order appealed against but as it has not considered whether the time for payment should be enlarged this should now be done. The lower appellate Court should consider, after taking or directing to be taken by the Subordinate Judge such evidence as the parties may adduce, whether there is good cause shown for enlarging the time fixed by the decree ; and if so, whether the appellant should be put to terms—and if so, whether the application may under S. 47 (2), Civil P. C., be treated as a suit. I would reverse the decree of the lower appellate Court and remand the application for disposal in accordance with this judgment.

In consequence of the difference of opinion between the learned Judges, the case came on for hearing before Shah, J.

**Shah, J.**—In this appeal in consequence of the difference of opinion between the learned Judges who heard the appeal, the following question has been referred to me under S. 98, Civil P. C. :

"Is the application or is it not time-barred under Art. 181 of the Schedule to the Limitation Act the application being regarded as one to extend time for the payment of the mortgage-debt?"

The few facts connected with this question are these : On 17th January 1907 the plaintiff obtained a decree in a redemption suit in these terms :

"The plaintiff do within six months from this day pay a sum of Rs. 391-13-0 and defendant 1's costs of the suit to defendant 1 and recover possession of the property in suit. In the event of the plaintiff failing to pay the moneys as stated above, defendant 1 may apply for obtaining relief under S. 15-B, Dekkhan Agriculturists' Relief Act. Defendant 1 do take in lieu of interest the income of the said land until the mortgaged property in suit is redeemed."

Neither party took any steps to execute this decree, which was passed under S. 15 B, Dekkhan Agriculturists' Relief Act. In 1915 the rights under the decree were assigned to the present respondent, who as representing the plaintiff made

(1) [1907] 9 Bom. L. R. 1026.
(2) [1904] 28 Bom. 102.
(3) [1911] 38 Cal. 913=11 I. C. 943.
(4) [1898] 22 Bom. 771.

an application on 27th September 1915 requesting the Court to allow him to pay the money which the plaintiff was required to pay and to get possession of the property under the decree. The trial Court allowed this application. The lower appellate Court confirmed that order, and in the appeal here in consequence of the difference of opinion, to which I have adverted, the question stated above has been referred to me. On a consideration of the arguments urged on either side and the reasons set forth in favour of either view in the differing judgments, I am of opinion that treating the application as one to extend time for the payment of mortgage-debt, it is barred under Art. 181, Lim. Act. In 1907 when this decree was passed under the Dekkhan Agriculurists' Relief Act, it was a decree capable of execution. It is not necessary for the purposes of this reference to express any opinion as to whether it was a decree which required to be made absolute by any further application either under the provisions of the Transfer of Property Act then in force, or after the Civil Procedure Code of 1908 came into force under the corresponding provisions of the Code.

Whether it was a decree nisi which required to be made absolute or not, it was a decree capable of execution: and any application to execute it would be governed by Art. 182. If the application of 27th September 1915 be treated as an application not merely for the extension of time for the payment of the mortgage-debt, but for the recovery of possession of the property, as in terms it purports to be, it is an application for the execution of the decree and as such it is time-barred under Art. 182. But treating it as an application for the enlargement of time only, as stated in the qnestion formulated for decision, I do not see how it can be held that there is no period of limitation applicable to it. Art. 181 refers to applications for which no period of limitation is provided elsewhere in Sch. 1, Lim. Act, or by S. 48, Civil P. C. An application for the extension of time for the payment of the mortgage-debt under a redemption decree, if not treated as an application for the execution of the decree, would clearly fall under Art. 181. It is an application for the exercise of powers referred to in the Code, and there is no other period of limitation prescribed for such an application on the assumption that it is not an application for the execution of the decree. The application would be time-barred, if it were not made within three years from the date on which the right to apply accured. In the present case the right to apply for the extension of time accrued on the date of the decree or at the latest on the expiry of the period of six months fixed for the payment of the debt under the decree. It is urged that the right to apply for the extension of time accrues from day to day so long as the right to redeem subsists, and that in effect there is no period of limitation applicable to an application for the extension of time. It is further urged that such an application is really an application for a modification and not for the execution of the decree. These contentions have been accepted by my brother Pratt. With great deference, I am unable to accept them.

As regards the first contention I do not think that the right to apply can be treated as a right accuring from day to day. The Court has the power to enlarge the time fixed under the decree for the payment of the mortgage-debt; but it has no power to enlarge the time prescribed by the Limitation Act. By treating the right to apply for the extension of time as a right accruing from day to day, the Court would in effect be allowing the plaintiff to do that indirectly which he could not do directly. That is, though his application for execution is time-barred, he could get over it by applying merely for extension of time long after the execution is time-barred. In effect the argument involves the result that there is practically no period of limitation governing the execution of an executable decree, so long as the right to redeem is not extinguished. I am of opinion that an argument involving such a result ought to be negatived.

As to the second contention, that the application is not to execute but to modify the decree, I doubt whether it has any practical importance in this case, as the question for decision apparently proceeds on the assumption that it is not an application for execution of the decree. If it were an application for execution, it would be clearly barred under Art. 182. But apart from this consideration, it seems to me to be in substance a part of the execution proceedings. The plaintiff

cannot recover possession under the decree without paying the amount within the time fixed by the decree or within such further time as the Court may allow under the provisions of the Code; and an application to extend the time is really an application to take a necessary preliminary step by way of execution when the payment is not made within the time fixed by the decree. For the purposes of limitation it may not be governed by Art. 182; that question does not directly arise in this case. But it would be and and ought to be governed by Art. 181. It seems to me that the provisions of the Limitation Act as well as the provisions of the Code relating to mortgage decrees can be given due effect without leading to any anomalous result by holding that an application to extend time is governed by Art. 181. It will appear from the observations in *Amolak Chand Parak* v. *Sharat Chandra Mukherjee* (3) and the decision in *Datto Atmaram* v. *Shankar Dattatraya* (5) that an application for a decree absolute under O. 34 is governed by Art. 181. The contention that there is no period of limitation for an application by the mortgagor to extend time for the payment of the mortgage-debt does not appear to me to be reconcilable with the view taken in the said cases.

It is needless to refer to other cases cited at the Bar. I may mention that there is nothing in my opinion in *Nandram* v. *Babaji* (4) and *Ishwar Lingo* v. *Gopal Jivaji* (2) which can be construed as being in conflict with my conclusion. The point, that I have to decide, did not arise in these cases. I therefore agree with my brother Heaton that the application is time-barred. As to the final order to be made, it appears that both the learned Judges agree, as stated in the judgement of Heaton, J., that if the application is time barred, the matter should be remanded so that the Court below may consider whether the application should be treated as as a suit under S. 47, Cl. (2), Civil P. C. The parties have raised no objection to the proposed order: and there has been no argument before me on the point. Under the circumstances that must be the final order. I express no opinion as to the propriety of such an order. I desire to make it clear that I express no opinion as to whether under the circumstances a second suit for redemption can lie. The result is that the orders of the lower Courts are set aside and the matter is remanded so that the Court below may consider whether the application should be treated as a suit under S. 47, Cl. (2), Civil P. C. The plaintiff should pay the costs throughout up to date.

G.P./R.K. *Case remanded.*

(5) A. I. R. 1914 Bom. 263= 38 Bom. 32= 21 I. C. 318.

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## A. I. R. 1919 Bombay 56

SHAH, J.

*On difference between*

HEATON AND PRATT, JJ.

*Ambalal Bapubhai Gujarati*—Plaintiff—Appellant.

v.

*Narayan Tatyaba Bhosale*—Defendant—Respondent.

First Appeal No. 194 of 1917, Decided on 29th January 1919, from decision of First Class Sub. Judge, Poona.

**Civil P. C. (5 of 1908), O. 34, R. 14—Consent decree in accounts suit—Decree directing payment by defendant—Decree also directing that it be charge on defendant's property—Executing Court held can bring property to sale—Charge held created to safeguard plaintiff's interest and not to reduce his rights under decree.**

A decree was made by consent on the original side of the High Court in an account suit. The first part of the decree directed payment by the defendant to the plaintiff of a certain sum of money, and the second part of the decree was as follows:

"The Court with the like consent doth declare that plaintiffs have a first charge and a lien on the land, hereditaments and premises, situated at, etc."

The Court to which the decree was transferred for execution held that the property could not be sold in execution in the absence of a direction in the decree as to the enforcement of the charge. The plaintiff appealed to the High Court contesting this view:

*Held*: that the decree-holder had the right to bring the property charged to sale in execution proceedings, and that the declaration in the decree as to the charge on the property in favour of the decree-holder in order to secure repayment of the amount of the decree had the effect of protecting him against any transfer of the property by the judgment-debtor, and not of reducing or modifying the right which the plaintiff had got in virtue of the direction that the defendant should pay the amount. [P 58 C 1, 2]

*Coyajee & S. R. Bakhle*—for Appellant.

*Patwardhan* and *B. K. Mehendale*—for Respondent.

**Heaton, J.**—My learned brother and I are agreed that if under the decree the "security property" (as it may be called) can be sold in execution, then the appeal must succeed and sale in execution sho ld

be allowed. If it cannot be sold in execution under this decree, then the order of the lower Court is correct and the appeal must be dismissed. My opinion is that sale of the "security property" can lawfully take place in execution proceedings under this decree and that no further suit is necessary. The case to my mind presents itself in this way: we have first to determine the intention of the parties to this cousent decree. The intention to my mind is plain, to this extent that on failure of the debtor to pay the debt the "security" is to be sold. Is it to be sold in the execution proceedings or only after a further suit? On this particular point the decree is silent. However, here also I do not myself feel doubt as to the intention of the parties: I believe they contemplated the simple, cheap and speedy device of a sale in execution and not the complicated, expensive and dilatory procedure of a second suit to be followed later by execution proceedings. The decree is a consent decree, not a decree drawn up by or under the superintendence of the Court, and so I should take the word "decree" to have its ordinary meaning and implication rather than the technical meaning which in certain cases the law has impressed on the word. To a nonlegal mind the word "declare" in this decree makes it clear that the property is security for the debt and can be sold for the debt; it does not, to the nonlegal mind, import anything as to the processes by which the sale is to be made, except possibly that they would be the ordinary legal processes.

I cannot myself see that it is necessary to give to the word "declare" in this case the very technical import which it must have if we are to refuse to sell the "security property" until a further suit has been brought.

The decree which was made in a Bombay High Court suit is, as I read it, analogous to a mortgage with a power of sale, which allows of a sale without any suit. That I believe to be the idea underlying this decree, a very familiar idea in Bombay. As we differ on the matter, we state the point of law to be submitted to a third Judge under S. 98, Civil P. C., as follows: What is the correct construction of the decree? Does it give the decree-holder the right to bring the property charged to sale in execution proceedings?

**Pratt, J.**—The appellants seek execution of a decree of this Court of 27th January 1914. The decree was made in account suit and the first part directs payment by the defendant-respondent to the plaintiffs of a certain sum of money. The second part of the decree is as follows:

"The Court with the like consent doth declare that the plaintiffs have a first charge and a lien on the land, hereditaments and promises situate, etc."

The appellants prayed for execution by sale of the property charged in the decree. The lower Court rightly held that the second part of the decree was declaratory merely. There can be no doubt that this is so. The decree as to the charge is expressed to be declaratory and there is no order directing the sale of the property charged. Mr. Coyaji contends however that plaintiffs have the right to sell the property charged in fulfilment of their personal remedy under the first part of the decree. The lower Courts have denied this, following the cases of *Aubhoyessury Dabee* v. *Gouri Sunkur Panday* (1), *Matangini Dassee* v. *Chooneymoney Dassee* (2) and *Hem Ban* v. *Bihari Gir* (3). As to this it is contended that these cases were decided under S. 99, T. P. Act, but that O. 34, R. 14, is more restrictive. It is true that while S. 99 prevented the mortgagee selling the mortgaged property under a judgment unconnected with the mortgage-debt, Order 34, R. 14, limits the restriction to a judgment for the mortgage-debt. But the case is within this limited restriction.

The decree creates the charge as well as the debt and the decree-holder may not therefore sell the property charged in satisfaction of the debt which is charged upon it. I do not think the fact that the decree was in a money suit and not on a mortgage makes any difference, for the original claim is now merged in the decree. Irrespective of S. 99, T. P. Act, and O. 34, R. 14, the sale of a bare equity of redemption under a judgment on the covenant was never allowed: *Khairajmal* v. *Daim* (4). I should therefore confirm the

(1) [1895] 22 Cal. 859.
(2) [1895] 22 Cal. 903.
(3) [1906] 28 All. 58.
(4) [1905] 32 Cal. 296=32 I. A. 23=8 Sar. 734 (P.C.).

decree of the lower appellate Court and dismiss this appeal with costs.

In consequence of this difference of opinion the case was referred to Shah, J.

**Shah, J.**—In consequence of the difference of opinion between the learned Judges who heard this appeal, the following question has been referred to me under S. 98, Civil P. C. :

" What is the correct construction of the decree ? Does it give the decree-holder the right to bring the property charged to sale in execution proceedings ?"

The decree in question was passed by consent on the original side of this Court in a suit in which the plaintiffs claimed to recover a certain sum of money from the defendant on an adjustment. The material terms of the decree are these :

" This Court by and with such consent doth order that the defendant do pay to the plaintiffs the sum of Rs. 35,789-6-11 for debt and interest and the costs of this suit when taxed and noted in the margin hereof and further simple interest at the rate of 6 per cent per annum upon the amount of the said judgment from the date hereof until payment, and this Court with the like consent doth declare that the plaintiffs have a first charge and a lien (on certain immovable property described) to secure re-payment of the amount of this decree and interest thereon . . . Any of the parties hereto is at liberty to apply to this Court as there may be occasion."

The learned First Class Subordinate Judge of Poona, to whose Court the decree was transferred for execution, held that the property could not be sold in execution in the absence of a direction in the decree as to the enforcemennt of the charge. This view was contested in the appeal by the plaintiffs, and it is on this question that there has been a difference of opinion. On a consideration of the terms of the decree I am of opinion that the decree-holder has the right to bring the property charged to sale in execution proceedings. The decree contains a distinct direction that the defendant should pay the sum to the plaintiffs. This gives the plaintiffs the right to attach and sell the property of the judgment-debtor under the Code of Civil Procedure and in the exercise of this right they can seek to realize the decretal amount or the balance thereof by the sale of the property in question. The declaration in the decree as to the charge on the property in favour of the decree-holders in order to secure repayment of the amount of the decree has the effect of protecting them against any transfer of the property by the judgment-debtor, and not of reducing or modifying the right which the plaintiffs have got in virtue of the direction that the defendant should pay the amount. The fact that liberty is reserved to the parties to apply as occasion may arise does not in my opinion, indicate any other meaning.

It is not uncommon in the mofussil in this Presidency to insert such declarations as to charges, particularly in decrees awarding future maintenance to Hindu widows, and no instance has been cited at the Bar in which the person holding a decree for the payment of future maintenance has been forced to a separate suit in order to secure the sale of the property charged for the realization of the decretal amount. I see no reason to think that in a decree passed on the original side of this Court the insertion of such a declaration would be intended or ought to have the effect of forcing the plaintiffs to a separate suit or of curtailing their right to bring the property to sale in virtue of the direction to the defendant to pay the amount. It may be that in the present case, if necessary, under the clause reserving liberty to the parties to apply, an express provision directing the sale of the property charged may be added to the decree by an application to the Court which passed the decree. On a construction of the decree, however, I do not think that any such provision is necessary.

It is urged on behalf of the defendant that under Rr. 14 and 15, O. 34, a separate suit for the sale of the property, as in the case of a mortgage, under S. 67, T. P. Act, is necessary. Under R. 15 the provisions contained in O. 34 as to sale of mortgaged property would apply to property subject to a charge within the meaning of S. 100, T. P. Act, so far as may be. Treating the charge under the decree as equivalent to a mortgage for the purpose of this argument the question is whether R. 14 would apply to the present case. The rule provides that:

"Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may in-

stitute such suit notwithstanding anything contained in O. 2, R. 2."

The words

"Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage"

mean that the decree should relate to the payment of money in satisfaction of a claim arising under the mortgage, i. e., a mortgage independent of the decree. It can have no application where the charge or the mortgage is created by the decree and where the direction as to payment of money is in no sense in respect of a claim arising under the charge or the mortgage. In the present case there was no charge or mortgage prior to the decree, and the claim in the suit did not arise under any charge but was an ordinary money claim. The payment of money in respect of the claim is secured by creating a charge but the obligation to pay exists apart from the charge and is enforceable. Thus R. 14 does not apply; and no separate suit for the sale of the property is necessary as provided by that rule. Mr. Patwardhan for the defendant has relied upon *Aubhoyessury Dabee* v. *Gouri Sunkur Panday* (1), *Hem Rau* v. *Behari Gir* (3) and *Gobinda Chundra Pal* v. *Kailash Chandra Pal* (5). I do not think however that these decisions can help him. The decisions in *Aubhoyessury Dabee* v. *Gouri Sankur Panday* (1) is based upon the terms of S. 99, T. P. Act, which is now replaced by R. 14, O. 34. The terms of S. 99 differ materially from those of R. 14. I am not now concerned with the question whether a separate suit would be necessary to bring the property charged to sale in the present case, if S. 99, T. P. Act, were still in force: in that event the said decision would no doubt be an authority in favour of the defendant's contention. But it cannot be treated as an authority in support of the view that R. 14 is applicable to the present case. The second case is distinguishable on the double ground that there was a prior security in that case and that the decision turned upon the provisions of S. 99. In the last case also there was a mortgage prior to the decree. It is significant that in that case the argument as to R. 14 is met by the fact that the decree-holder was a charge-holder at the date of the decree. In the present case the fact is otherwise.

(5) [1917] 45 Cal. 580=41 I. C. 73.

I therefore, agree with my brother Heaton in holding that the property charged can be sold in execution. The result is that the order of the lower Court is set aside and the lower Court is directed to proceed with the darkhast according to law. The defendant to pay the costs of this appeal, other costs to be costs in the darkhast.

G.P./R.K. *Order set aside.*

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## A. I. R. 1919 Bombay 59

HEATON AND HAYWARD, JJ.

*Emperor*

v.

*Punjagodad* and *another*—Accused.

Criminal Appeals Nos. 241 and 242 of 1918, Decided on 26th September 1918, against order of Sess. Judge, Ahmedabad.

**Penal Code (1860), S. 427—Owner of cattle habitually and intentionally permitting cattle to stray and graze on crops of others—Owner is guilty under S. 427, I. P. C. and Cattle Trespass Act (1871), S. 26.**

Where it is established that an owner of cattle habitually and intentionally permits his cattle to stray in order that they might graze on the crops of others, then any given instance of such straying cannot be regarded merely as a case of negligence, and the owner is in such a case guilty of offences under S. 427, I.P.C., and S. 26, Cattle Trespass Act. [P 60 C 1, 2]

*S. S. Patkar*—for the Crown.

*G. N. Thakor*—for Accused.

**Heaton, J.**—The Government of Bombay have appealed against the acquittal by the Sessions Judge of Ahmedabad of two men who were originally convicted by the First Class Magistrate of Nadiad for mischief under S. 427, I. P. C., and also under S. 26, Cattle Trespass Act. The facts broadly are these: one day cattle belonging to the two accused were found in the Nadiad Association Farm, and they did on that occasion damage, which is estimated at more than Rs. 200, to the growing crops. This farm had been troubled on previous occasions by trespasssing cattle, and damage had also been done and as the Farm Overseer tells us, some of the cattle that came on to the farm on the particular occasion we are concerned with, were the same which had previously damaged the crops at the farm. On the previous occasions apparently the farm people had failed to seize the cattle but on this particular occasion—it was 26th November 1917—they seized and took them to the pound. About these facts there is no doubt whatever. The two accused are the owners of the cattle

and are rabaris. There are two theories in this case; one is the theory of the prosecution and the other that of the defence.

The prosecution say that the accused, the owners of the cattle, habitually allowed them to stray in order that they might feed on the growing crops of others. The alternative defence theory is that there was no such intention or purpose, but that the cattle-owners or rabaris were not quite so careful as perhaps they ought to be, and consequently this unfortunate result happened. Now if it is established that the rabaris did habitually and deliberately permit their cattle to stray in order that they might graze on the crops of others, then any given instance of such straying cannot, as a matter of common sense and ordinary reason, be regarded merely as a case of negligence. Equally clearly any such case falls within the definition in S. 425, I. P. C., and within S. 26, Cattle Trespass Act. As regards the latter section, I may mention here that the Sessions Judge in appeal fell into an error in supposing that the operation of this section had not, in the Nadiad taluk been extended to the case of cattle. The Government Pleader has pointed out to us that in fact it has been so extended, and this will appear from the Notification No. 4069, dated 24th November, published at p. 968, Part 1, of the Bombay Government Gazette, 1891. Now, as I said, if these cattle were habitually and intentionally so conducted or driven as to result in their grazing on other peoples' crops, then the offences charged would be proved. The question before us therefore is not a question of law at all, but a question of fact. Are we justified in inferring or compelled to infer from the circumstances proved in the case that these rabaris deliberately and designedly permitted their cattle to graze on the crops of others? The circumstances established are not only those which I have already mentioned. There are these further facts: the cattle of these two accused have been impounded, between 1st April 1917 and 1st January 1918, 85 times in the case of the accused 1, and 94 times in the case of the second. In a great majority of these cases they were impounded not by public servants but by private persons. Where these impoundings were by private persons, the inference is that they were made because the cattle had done damage to the crops of those persons.

I think when facts such as these are established—and they are established in this case—one is driven to the conclusion that these rabaris did designedly contrive that their cattle should graze on other peoples' crops. I really cannot myself find any other rational explanation of the matter. To me it seems to be futile to talk of nothing worse than negligence. I think any ordinary reasonable man would in all probability infer an undoubted and deliberately mischievous intention, and that is what I do infer. The defence evidence is entirely unconvincing. The defence say that the rabaris' cattle strayed when taken to their grazing lands. But the straying was too persistent for this explanation to account for it in a way satisfactory to what I conceive to be the average mind. Therefore the prosecution have made out a clear intention in the accused to have their cattle graze on crops at the expense of the farmers. This in my opinion clearly falls within the definition of mischief in S. 425, I. P. C., and equally within the intention of S. 26, Cattle Trespass Act. When the matter went in appeal before the Sessions Judge, he acquitted the accused partly because he made a mistake as to the application of S. 26, Cattle Trespass Act, and partly because he thought that no more than negligence should be the inference from the circumstances. It is clear from what I have said that this is in my opinion a mistaken conclusion. We agree that these two men must be convicted of offences under S. 427, I. P. C., and S. 26, Cattle Trespass Act, and that they should both of them undergo rigorous imprisonment for three months in each case and that the order as to fines should remain as in the judgment of the First Class Magistrate.

**Hayward, J.**—I concur. I consider that criminal intention has been completely proved by the previous 85 occasions in which the cattle of accused 1 and the 94 occasions in which the cattle of accused 2 had been impounded for trespass during the preceding ten months. The impoundings were mostly by private persons who could only have impounded cattle for straying upon, and doing damage to, their lands under S. 10, Cattle Trespass Act. When the question is whether an act was accidental or inten-

tional, a series of similar occurrences are relevant under S. 15, Evidence Act. It is not essential to prove an act, but it is sufficient to show an omission, such as the omission to take due care of cattle, to constitute the offence of causing mischief by reason of the provisions of S. 32, I. P. C. It is again not necessary to prove that the accused directly intended the mischief caused or that it was inevitable, as stated by the learned Sessions Judge. It is sufficient to show that the accused knew it was likely that the mischief would result, as expressly prescribed in Ss. 425 and 427, I. P. C. Deterrent sentences are in my opinion necessary in view of the remarks regarding the seriousness of such offences made in the judgment by the learned Sessions Judge.

G.P./R.K. *Appeals allowed.*

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## A. I. R. 1919 Bombay 61

HEATON AND HAYWARD, JJ.

*Mirkha Imamkha*—Defendant 2—Appellant.

v.

*Bhagirathi Mahadev Abhyankar* and *others*—Respondents.

Cross-Appeals Nos. 43 and 113 of 1917, Decided on 8th August 1918, from decision of Addl. First Class Sub-Judge, Poona, in Suit No. 344 of 1911.

**(a) Mahomedan Law — Debts — Decree against estate of deceased Mahomedan — Daughter not made party—House sold in execution—Her interest held did not pass.**

A money decree was obtained against the estate of a deceased Mahomedan in a suit by a creditor in which the widow and the stepmother of the deceased were impleaded as defendants. The daughter of the deceased who was his principal heir was not made a party to the suit. In execution of the decree the right, title and interest of the deceased in a house belonging to him was sold.

*Held*: that the daughter of the deceased not having been made a party to the suit, her interest in the house was not affected by the decree and did not pass under the sale. [P 63 C 2]

**(b) Administration — Creditor's suit to establish his single debt is not an administration suit.**

A suit by a creditor to establish a single debt against the estate of a deceased person cannot be treated as an administration suit. [P 62 C 1]

**(c) Execution—Sale—Property not saleable in execution of decree—Sale if held is invalid.**

Per *Heaton, J.*—There cannot be a valid sale under a decree unless the property sold can properly be sold under the decree. [P 62 C 1]

*G. S. Rao*—for Appellant.

*J. R. Gharpure*—for Respondent 4.

**Heaton, J.**—The facts which we have had to master in the consideration of these appeals are complicated, but for the purpose of Appeal No 113 of 1917 they may be simply stated: a Mahomedan named Mainaba died possessed of five houses, leaving as his heirs a son, two widows and three daughters. The son, Mahomed Hanif, died afterwards leaving as his heirs a daughter Aminabi, his widow Roshanbi and a son who was afterwards held to be illegitimate and not to be an heir. A money decree was obtained against the estate of Mahomed Hanif in a suit by a creditor in which the defendants were that deceased person's widow Roshanbi, and his stepmother Sakinabi and the son Abdul. His daughter Aminabi, who was really his principal heir, was not made a party to the suit. Thereafter one of the five houses known as No. 371 was sold in execution of the decree and bought by defendant 4. What was sold was the right, title and interest of Mahomed Hanif, deceased. The plaintiff has become, by processes which it is immaterial at present to set out, the owner of whatever interest Aminabi had in this house. She sued inter alia to recover by partition Aminabi's share and her claim in this particular was rejected. She now appeals to us.

She claims that Aminabi's interest in the house was not bound by the decree obtained by the creditor, because Aminabi was not made a defendant in the creditor's suit and that consequently her interest in the house did not pass to the auction-purchaser, defendant 4. The latter contends, firstly, that Aminabi's share in the house could be sold under the decree, for the decree was against the estate of her deceased father from whom she inherited her interest in the house; and, secondly, in any event, that Aminabi's interest in the house passed at the sale; for what was sold and what was paid for was the father's interest. If the decree was such that Aminabi's interest could be sold under it, then undoubtedly that interest was sold, for it was included in the father's interest the whole of which was sold. If her interest in the house was not bound by the decree, nevertheless, as it was in fact sold, it is contended that it would pass to the purchaser, defendant 4. This contention however, we think, has nothing

substantial to support it. There cannot be a valid sale under a decree unless the property sold can properly be sold under the decree.

Let us consider the real question: whether the creditor's decree would bind the interest of Aminabi who was not made a defendant. If we consider this question in a purely general way ignoring all questions of Hindu or of Mahomedan law the answer must, I think, be that the decree would not bind Aminabi's interest. She was just as much concerned in the matter as the other defendants; in fact more so, for her share in the property was larger. She could not be bound by the decree unless she was in some way properly represented and as a fact she was not represented. She was indeed definitely and explicitly excluded. For the creditor had brought an earlier suit to which Aminabi was a defendant, but the claim as against her was dropped, though against the others and as to them only it was withdrawn with leave to bring another suit. But even if this had not happened, the decree would not be operative against Aminabi's interest. It could not be if she was not represented; and she would not be represented in such a suit to which she was not a party, apart from the peculiarities of Hindu or Mahomedan law; except on the somewhat curious theory that a creditor's suit, such as this, is in effect an administration suit by a creditor. I do not think it is, although there are Calcutta decisions favouring this view: *Muttyjan* v. *Ahmed Ally* (1), followed in *Amir Dulhin* v. *Baij Nath Singh* (2). It seems to me to be a mistake in terms to call a suit by a crediton to establish a single debt against the estate of a deceased person a creditor's administration suit. Neither the proceedings nor the decree were appropriate to an adminstration suit. There was a difference in substance as wellas in form. Chandavarkar, J., saw a great difference between such suits as will appear from the observations at the end of his judgment in *Bai Meherbai* v. *Maganchand* (3).

It may at first sight appear that the law is unreasonable, if it will not allow a creditor to establish a debt against the estate of a deceased debtor without making all the heirs defendants, for some or most of the heirs may be in distant countries and it may be impossible to obtain a decree within a reasonable time if all are to be made parties. But this view of the law is, I am glad to think, fallacious. The creditor can compel one of the heirs on the spot to take out letters of administration or failing that can take out such letters himself, a proceeding which can be accomplished within a reasonable time although many of the heirs may be living in distant parts of the world. But if a creditor ignores the Probate and Administration Act and elects to bring an ordinary suit he must be content with the law applicable to ordinary suits. That is both just and reasonable in my opinion. Does the fact that the deceased debtor was a Mahomedan make any difference? There cannot, of course, be any appeal to Hindu law in this case, for we are concerned only with the ordinary law or with the Mahomedan Law. The point is fully and clearly dealt with in para. 161 of Sir Roland Wilson's Digest of Anglo Mahomedan Law, Edn. 3, and in paras. 566 and 567 of F. B. Tyabji's Principles of Mahomedan Law. I shall unhesitatingly accept Sir Roland Wilson's conclusions and follow the Allahabad decisions if it be open to us to do so. But is it open to us? Are we not bound by the Bombay decisions referred to in Sir Roland Wilson's discussion of the law?

The two Bombay cases referred to by Sir Roland Wilson are *Khurshetbibi* v. *Keso Vinayek* (4) and *Davalava* v. *Bhimaji Dhondo* (5). The former judgment in its reasoning deals exclusively with the sale not with the decree; it does not pronounce whether the decree would bind an heir who was not made a defendant; it finds that the auction-purchaser bought a certain interest in property and was therefore entitled to that interest. In the second case the decision was to the same effect: there had been a sale under a decree and the matter decided was rather what the auction-purchaser had bought than what was the effect of the decree. But in any event the later case is no authority; not only because the point decided is the effect of the sale, not of the decree, but also because the reasons given by the two

(1) [1882] 8 Cal. 370=10 C. L. R. 346.
(2) [1894] 21 Cal. 311.
(3) [1905] 29 Bom. 96.
(4) [1888] 12 Bom. 101.
(5) [1896] 20 Bom. 338.

Judges are different. Jardine, J. seems to have had doubts as to applying to Mahomedans a rule evolved from Hindu law and he contented himself with relying on and following the case of *Khurshetbibi* v. *Keso Vinayek* (4). We are therefore thrown back on that case as the one which stands in the way of giving effect to what we believe to be the law.

Broadly speaking only the parties to a suit are bound by a decree and consequently only their property can be sold under the decree. But to this general rule there is an apparent exception in the case of Hindus. It has become by now well established that the whole of a Hindu family property is in certain circumstances liable to be sold in execution of a decree to which all the sharers are not parties. This is an exception to the general law and appears to be based on some principle of representation which is evolved from a consideration of the law applicable to joint Hindu families. This exception is neither stated nor explained in the case of *Khurshetbibi* v. *Keso Vinayek* (4); it is simply assumed; so we have to look elsewhere for the explanation. We need not go very far. In the case of *Akoba Dada* v. *Sakharam* (6), Sir Charles Sargent, the same learned Judge who gave judgment in *Khurshetbibi's* case (4), said as follows:

"These cases doubtless establish that when the minor son is substantially before the Court, and the proceedings show a clear intention on the part of the Court making the decree to bind the entire estate which is subject to the debt, no mere technical or formal objection will be allowed to prevail against giving full effect to the decree."

Again in the case of *Bissessur Lal Sahoo* v. *Maharajah Luchmessur Singh* (7) the Judges of the Privy Council observed:

"Their Lordships have therefore come to the conclusion that although there may have been some irregularity in drawing up these decrees, they are substantially decrees in respect of a joint debt of the family and against the representative of the family."

Then in the case of *Ishan Chunder Mitter* v. *Buksh Ali Soudagur* (8), the earliest of all the cases, the liability of a Hindu under a decree to which he was not a party is illustrated by the analogy of a suit against an executor. Underlying all these cases is the idea of substantial representation, and the idea arises out of the peculiarities of the Hindu joint family where the property is family property, not individual property and where the representation is to be of the family, not of individuals. It is clearly essential therefore in these cases to ascertain first of all whether the person, whose property is sold under a decree, but who was not a party to the decree, was substantially represented in the suit. In this case we know that Aminabi was not substantially represented; she was specifically excluded. That consideration alone would, in this case, demand that the appeal be allowed and that it be held that Aminabi's share in the house could not and did not pass by the sale. But many hours of our time have been spent on the question whether the exception to the general law, which we are considering, applies to Mahomedans as well as to Hindus. Why should it? No reason whatever is given in *Khursketbibi's* case (4) and none that appeals to us in Ranade, J's., judgment in *Davalava's* case (5). Indeed there is apparently no Bombay case in which the matter is discussed, except in *Davalava's* case (5) and in that case Jardine, J., does not say a word on the point and Ranade, J., gives reasons which as I have said, do not appeal to us.

The truth seems to be that a rule derived from Hindu law was applied to Mahomedans without the reasons being stated. Quite recently a Full Bench of this Court sat to consider a very remarkable instance of this practice of applying Hindu law to Mahomedans. My learned brother and myself have considered the matter most carefully and have come to the conclusion that it would not be incumbent on us to follow the case of *Khurshetbibi* v. *Keso Vinayek* (4), if that case be held to affirm that the theory of substantial representation derived from the Hindu law applies to Mahomedans. For to follow that case, if it so decides, would be to accept without any stated reason for doing so, the application to Mahomedans of a rule evolved out of Hindu law; and to do this would, we think, be to set aside the principle underlying the decison of the Full Bench of this Court in *Isap Ahmad Mograria* v. *Abhramji Ahmadji Mograria* (9).

The plaintiff sued for mesne profits from the date of suit and should have such profits, which must be determined in execution. We have heard the cross-

(6) [1885] 9 Bom. 429.
(7) [1878-79] 6 I. A. 233=5 C. L. R. 477 (P. C.).
(8) Marsh. 614.
(9) [1917] 41 Bom. 588=41 I. C. 761.

objections of defendant 1 and find there is no substance in them. We dismiss them with costs. We allow Appeal No. 113 of 1917 with costs against defendant 4. The decree will have to be modified so as to allow plaintiff to obtain on partition Aminabi's share in house No. 371 and to award plaintiff mesne profits from date of suit in respect of that share from defendant 4. In Appeal No. 43 of 1917 defendant 2 is the appellant. He has a mortgage from Sakinabi, one of the widows of Mainaba and the step-mother of Mahomed Hanif. This mortgage-deed has not been put in evidence, but it appears that defendant 2 is in possession of the ground floor of house No. 529 and he desires that directions should be given that in making the partition the ground floor of house No. 529 should, if possible, be allowed to Sakinabi's share. The desire is natural, but the request is one to be presented and considered when the partition comes to be made. Only the person who makes the partition, knowing the value of the total estate and the value of each house separately and also knowing something of the convenience and wishes of the sharers, can make an equitable and fair partition. The matter is not one for us to pronounce on in appeal, for it has not yet been dealt with by the appropriate authority. But we think defendant 2 should not be made liable for plaintiff's costs: that would be most unfair. The decree of the lower Court must be modified by providing that defendant 2 is to pay only his own costs. We make no order as to costs in this appeal.

**Hayward, J.**—The plaintiff sued as purchaser to recover possession by partition of Aminabi's share in house No. 371 in Poona City, being part of the estate of Aminabi's deceased father, Mahomed Hanif. Defendant 4 resisted the suit as the purchaser of the whole house at a Court sale of the estate of the deceased Mahomed Hanif. It was not disputed that Aminabi was not personally represented in the litigation leading to the Court sale, but it was contended that her share was bound, at it was in the possession of Roshanbi and was sufficiently represented in the litigation by Roshanbi, the widow of the deceased Mahomed Hanif. This contention was upheld on the strength of the decision in the case of *Davalava* v. *Bhimaji* (5) by the trial Court. The substantial questions for determination on this first appeal are whether that decision ought to be regarded as binding and, if not, whether it was right. It seems to me that it ought not to be regarded as binding, as the two learned Judges did not agree on the ratio decidendi, which is alone binding according to the authorities underlying p. 535 Vol. 18, Halsbury's Laws of England; and, with all deference, that it was wrong in that it applied without justification a rule founded on the peculiar nature of the joint family of Hindus to the heirs of a deceased Mahomedan.

It was held by Sir Barnes Peacock in the case of *Ishan Chunder Mitter* v. *Buksh Ali Soudagur* (8) that a Court sale was binding on the minor son of a Hindu, based upon a decree obtained against the widow as representing the estate of the deceased Hindu. This was approved by the Privy Council in the case of *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh* (7), and it was said that it was necessary to look to the substance of the proceedings in Court sales relating to the estates of deceased Hindus. This principle of representation was subsequently applied by their Lordships in the case of *Daulat Ram* v. *Mehr Chand* (10) to the transactions of the managing members of joint families of Hindus and it has been regarded ever since as a settled rule governing the joint families of Hindus, as would appear from Paras. 320 and 333 at pp. 425 and 443, Edn. 8 of Mayne's Hindu Law It was acted upon by Sir Charles Sargent in the case of *Jairam Bajabashet* v. *Joma Kondia* (11), where the minor sons of a deceased Hindu were not allowed to dispute the sale of the family property under a decree against the elder son for a debt of the deceased Hindu, and it was extended by the same learned Judge in the case of *Khurshetbibi* v. *Keso Vinayek* (4) to the heir of a deceased Mahomedan. There the daughter was held bound by a sale under a decree against the son of the deceased Mahomedan. This could not be regarded as a binding authority, as no reasons were given for extending the rule of the joint family of Hindus to the heirs of deceased Mahomedans. No reference was made to the rules of Mahomedan law nor to the provisions of Regn. 4 of 1827 requiring

(10) [1888] 15 Cal. 70=14 I. A. 187=1 P. R. 1888 (P. C.).
(11) [1887] 11 Bom. 361.

Mahomedan law to be applied to Mahomedans in default of Acts of the legislature. It was, moreover not applied by the same learned Judge several years later to the case of *Ambashankar Harprasad* v. *Sayad Ali Rasul* (12). It was however relied on again, without reasons being stated, by Jardine, J., in the case under immediate consideration, namely, *Davalava* v. *Bhimaji Dhondo* (5). Ranade, J., on the other hand dealt in detail with the matter but his reasons, though entitled to respect, could not be regarded as binding in default of the approval of the second Judge. He discussed at length the rule governing the joint families of Hindus and then proceeded (p. 345) to state that there was no foundation for the contention that the rule was based on the peculiar constitution of a Hindu joint family and that the analogy did not hold good in the case of Mahomedans. His authority for this somewhat startling statement was an obiter dictum in the case of *Hukeem Bibee* v. *Khajah Gowhur Ali* (13), cited in *Assamathen Nessa Bibee* v. *Roy Lutchmeeput Singh* (14), and the extension of the rule without express reasons in the case already mentioned of *Khurshetbibi* v. *Keso Vinayek* (4).

He stated further that the creditor could seek his relief against one of several heirs in a case where all the effects might be in the hands of that heir, as the succession was of the kind known as universal and any one of the heirs of a deceased person stood as litigant on behalf of all the others. He relied for this statement on the dissentient judgment of Markby, J., in the Full Bench case of *Assamathen Nessa Bibee* v. *Roy Lutchmeeput Singh* (14). Markby, J., there held that the heirs in possession merely represented the estate, which devolvd upon them with all its rights and liabilities by universal succession, and that the estate did not vest in all the heirs immediately as owners (pp. 157 to 159), relying on the rules of procedure contained in the Hedaya for the disposal of the estate of a deceased Mahomedan. But this view was not adopted by the majority of the Judges of the Full Bench and it was expressly dissented from by Mahmood, J., as being based upon mere rules of procedure superseded by the Civil Procedure Code, in his exhaustive judgment in the later case of *Jafri Begam* v. *Amir Muhammad Khan* (15) before the Full Bench of the Allahabad High Court; and the results of the investigation of Mahmood, J., were accepted in the case of *Amir Dulhin* v. *Baij Nath Singh* (2) by a subsequent Bench of the Calcutta High Court. There would appear therefore to have been but slender foundations in the authorities to support the proposition put forward by Ranade, J., in the case under immediate consideration, namely, *Davalava* v. *Bhimaji Dhondo* (5), that the particular rule governing the transactions of managing members of joint families of Hindus ought to be extended by analogy to the case of Mahomedans.

It was again expressly denied that such extension was permissible in the later case of *Pathummabi* v. *Vittil Ammachabi* (16) before the Madras High Court; it was said (p. 738) on the authority of *Davalava* v. *Bhimaji* (5) that the creditors could seek relief against the heirs in possession of the whole estate under the Mahomedan law. But this later dictum also was shown to be untenable in the judgment of Abdur Rahim, J., in the subsequent case of *Abdul Majeeth* v. *Krishnamachariar* (17) before the Full Bench of the Madras High Court. It seems to me therefore with all deference, that the proposition propounded by Ranade, J., extending the rule of representation governing the joint families of Hindus to the heirs of deceased Mahomedans ought, upon the authorities, to be rejected, as directly contrary to the spirit of the provisions of Regn. 4 of 1827; and that the rules of the Hedaya providing for the representation by the heirs in possession of the estate of a deceased Mahomedan ought to be disregarded, as mere rules of procedure superseded by the Civil Procedure Code, as pointed out by Mahmood, J., in *Jafri Begam* v. *Amir Muhammad Khan* (15) before the Full Bench of the Allahabad High Court and approved in the case of *Amir Dulhin* v. *Baij Nath Singh* (2) by the Calcutta High Court and in the judgment of Abdur Rahim, J., in the case of *Abdul Majeeth*

(12) [1895] 19 Bom. 278.
(13) 5 Wym. 27.
(14) [1879] 4 Cal. 142=2 C. L. R. 228 (F. B.).
(15) [1885] 7 All. 822.
(16) [1903] 26 Mad. 734.
(17) [1917] 40 Mad. 243=40 I. C. 210 (F. B.).

v. *Krishnamachariar* (17) before the Full Bench of the Madras High Court.

It remains only to notice an alternative theory adopted in the case of *Muttyjan* v. *Ahmed Ally* (1) by the Calcutta High Court, that creditors' suits against the heirs in possession should be regarded as administration suits binding on all the heirs of a deceased Mahomedan. It was considered and rejected by Mahmood, J., in the case of *Jafri Begam* v. *Amir Muhammad Khan* (15) before the Allahabad High Court, but was reasserted in the case of *Amir Dulhin* v. *Baij Nath Singh* (2) by a subsequent Bench of the Calcutta High Court. It seems to me, with all deference, that mere creditors' suits would be altogether different, as pointed out by Mahmood, J. They would be solely on behalf of those particular creditors and not on behalf of all creditors as contemplated by the form of plaint No. 41 in App. A, and by the form of preliminary decree requiring public notice to all interested, No 17, (13) in App. D, Sch. 1, Civil P. C. Nor would they result in the satisfaction of all persons interested and the final distribution of the estate as provided in the form of final decree No. 18 in App. D and in O. 20, R. 13, Sch. 1, Civil P. C. It seems to me, moreover, that there would be no necessity for regarding them as anything but what they really would be or for adopting the admittedly inexact analogy of administration suits for there would be nothing to prevent their being brought, if desired, in the proper form; and ample remedy for any practical inconvenience has already been provided in Ss. 23 and 69, Probate and Administration Act, 1881, by the legislature. Defendant 4 ought not therefore in my opinion, to be permitted to succeed either on this ground.

He would not be entitled to succeed on the special rule as to representation by managers of joint families of Hindus as already shown and, as it seems to me, further indicated by the remarks of their Lordships in the case of *Khiarajmal* v. *Daim* (18) before the Privy Council. Nor would he be entitled, as already shown, to appeal to any similar rule of representation under the Mahomedan law in order to escape the general rule there applied (p. 312), that the property of parties not properly represented on the record could not validly be sold by the Court. The discussion by their Lordships of the supposed powers of de facto guardians in the most recent case of *Imambandi* v. *Mutsaddi* (19) supports, it seems to me, the view that no such rule of representation could be pleaded under Mahomedan law in aid of an invalid sale by the Court. This case would appear not yet to have been reported. It was only decided on 28th February 1918 by the Privy Council.

This appeal ought therefore in my opinion to be allowed. The cross-objections of respondent 1 ought to be dismissed with costs. The appeal of respondent 2 ought to be dismissed with costs. Possession by partition of the particular house in dispute with mesne profits and costs ought to be allowed against respondent 4.

G.P./R.K. *Order accordingly.*

(18) [1903] 32 Cal 296=32 I. A. 23 (P. C.).

(19) A. I. R. 1918 P. C. 11=45 Cal. 878=45 I. A. 73=47 I. C. 513 (P. C.).

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## A. I. R. 1919 Bombay 66

HEATON AND HAYWARD, JJ.

*Bhiva Bhika Chokekar*—Defendant—Appellant.

**v.**

*Babu Balshet Bobhate*—Plaintiff—Respondent.

Second Appeal No. 82 of 1917, Decided on 25th September 1918, against decision of Dist. Judge, Ratnagiri, in Appeal No. 535 of 1915.

**Bombay Khoti Settlement Act (1 of 1880), S. 21—S. 21 makes certain decisions conclusive—Preceding sections point out what those decisions are—Decisions as to class of tenure and rights of khot are made conclusive by S. 21.**

Section 21, Khoti Settlement Act, makes conclusive certain decisions of the officer defined as the recording officer. What these decisions are is to be gathered from the preceding sections of the Act, and a perusal of those sections makes it clear that the mere entry of the name of some particular person as occupant of a plot is not included among those decisions of the recording officer. What are contemplated as conclusive are decisions as to the class of tenure and as to the complicated rights of the khots.

[P 67 C 1]

*P. B. Shingne*—for Appellant.

*S. S. Patkar*—for Respondent.

**Hayward, J.**—The plaintiffs sued the six defendants for partition of his half-share in certain lands in his possession on the strength of a sale deed of 1879. The six defendants joined in one written

statement denying his possession as purchaser. The trial Court however found the purchase proved and gave a decree for partition with the exception of a plot of land entered in the name of defendant 6 in the survey records. The first appellate Court modified the decision by including in the partition the plot standing in the name of the defendant 6. In second appeal it has been urged that this plot ought to be excluded, on the ground that the entry of the name of defendant 6 in the survey records was conclusive as to her title, under S. 21, Khoti Settlement Act.

It is unfortunate that we have not in evidence the particular entry of the sixth defendant's name in the survey records. All we have is the document Ex. 26, in which the validity of the sale deed was expressly admitted by defendant 6 before the survey settlement officer. There can, in my opinion, be no doubt that on that evidence the particular plot entered in the name of defendant 6 ought not to be excluded from the partition, and effect would have to be given to that conclusion unless clear legal objection should appear under the provisions of S. 21, Khoti Settlement Act.

Now that section makes conclusive certain decisions of the officer defined as the recording officer. What those decisions are is to be gathered from the preceding sections, and a perusal of those preceding sections seems to me to make it clear that the mere entry of the name of some particular person as occupant was not intended to be included among those decisions of the recording officer.

What were contemplated as conclusive were decisions as to the class of tenure and as to the complicated rights of the khots. The appellant could not therefore in this appeal have recourse to the provisions of S. 21, Khoti Settlement Act.

The appeal ought therefore in my opinion to be dismissed with costs. A similar view was taken by another Bench of this Court in the case of *Mahomed Ibrahim* v. *Ali Mahomad Ali Pangarkar*, Second Appeal No. 850 of 1914.

**Heaton, J.**—I agree.

G.P./R.K. *Appeal dismissed.*



## * A. I. R. 1919 Bombay 67

SCOTT, C. J. AND MACLEOD, J.

*G. I. P. Ry.*—Defendants—Appellants.

v.

*Ramchandra Jagannath*—Plaintiff—Respondent.

Original Appeal No. 4 of 1918. Decided on 3rd September 1918, against decision of Kajiji, J.

**(a) Railways Act (1890), S. 75—Delivery of parcel containing account books to Railway Company—Parcel misdelivered by Railway Company and destroyed in consequence—Suit by consignor for damages—Questions as to protection of company from liability under S. 75 and measure of damages decided.**

Plaintiff delivered a parcel containing account-books to the defendant Railway Company for carriage from Bombay to Nagpur. At Nagpur the parcel was by mistake delivered to the Superintendent of Jail who destroyed it. Plaintiff sued the defendant company for damages caused to him by reason of the loss of the account-books:

*Held*, Per *Scott, C. J.*—(1) that the intrinsic value of the account books being less than Rs. 100 the defendant company were not protected from liability und S. 75 (2) that although S. 75 did not directly protect the defendant company, the loss for which the company were liable must be estimated by the same measure of damages as employed in the section, so that the plaintiff was not entitled to recover more than the intrinsic value of the account-books, [P 70 C 1]

*Held*, Per *Macleod, J.*—That the mere fact that the plaintiff was claiming more than Rs. 100 for the loss of an undeclared excepted article precluded him from asserting that its value was under Rs. 100, so that the defendant company was protected by S. 75. [P 71 C 1]

**(b) Railways Act (1890), S. 75—Object of S. 75 is to protect Railway Company from liability for loss etc. of parcels containing articles of special value exceeding Rs. 100 unless they have notice of contents.**

The object of S. 75 is to protect a Railway company from liability for the loss, destruction or deterioration of parcels entrusted to them for carriage containing articles of special value exceeding in value Rs. 100 unless they have notice of the contents, so that (a) they can demand a percentage on the value declared by way of compensation for increased risk, (b) they can take extra precautions for the safe carriage of such parcels. The whole object of the section would be defeated if the consignor could claim consequential damages for the loss of an excepted article without insuring it, on the ground that its market value was under Rs. 100. [P 71 C 1, 2]

***(c) Railways Act (1890), S. 75—Consignor claiming against Railway for loss of excepted goods and consequences of loss—Claim is value of goods to him—If claim be over Rs. 100 he cannot say that loss and consequences of loss to any one else would not be worth Rs. 100 and that he was not bound to insure under S. 75.**

When a consignor makes a claim against a carrier for the loss of excepted goods and the

consequences of the loss, he is claiming the value of the goods to him and if his claim is over Rs. 100, he cannot be allowed to say that the loss and the consequences of the loss to anyone else would not be worth Rs. 100 and that therefore he was not bound to declare the value of the goods and insure them under S. 75, Railways Act. [P 72 C 1, 2]

**(d) Railways Act (1890), S. 75—Goods of value exceeding Rs. 100 entrusted for carriage—Declaration not made under S. 75—S. 75 is absolute bar to action against Railway Company for loss.**

Section 75 is an absolute bar to an action against a Railway company for any amount exceeding Rs. 100 for the loss and the consequences of the loss of excepted goods entrusted to them for carriage unless a declaration has been made under the section. [P 72 C 2]

*Campbell* and *Strangman*—for Appellants.

*Setalvad* and *Jinnah*—for Respondent.

**Scott, C. J.**—On 16th September 1916 the plaintiff delivered to the defendants, and the defendants accepted, at the Victoria Terminus Station a parcel containing 24 account-books consigned to the plaintiff's firm at Nagpur for carriage from Victoria Terminus Station to Nagpur. The parcel arrived at Nagpur on 18th September. On the 19th it was misdelivered to a Chaprasi from the Nagpur Jail, who had come for another parcel which was of the same weight and bore a similar number upon it. The parcel, for which the jail chaprasi had come, had been despatched from Khandwa, also on 16th September, in order that the papers contained in it might be destroyed in the Nagpur Jail. The plaintiff's books, after being delivered to the jail chaprasi, were taken to the jail superintendent and were then destroyed by mistake owing to his thinking that they were the papers consigned from Khandwa. The plaintiff submits that the account books have been lost to him by reason of the negligence of the defendants. In para. 6 of his plaint he says the account books contained in the parcel contained the record of all the dealings and transactions of the plaintiff's firm with their various customers in respect of the agency business at Nagpur and were the only source from which the plaintiff could ascertain the debtors and creditors of his firm. The plaintiff says that he will be put to a heavy loss, which the plaintiff estimates at a sum of Rs. 25,000, by reason of the loss and destruction of the said books and submits that he is entitled to recover the said sum of Rs. 25,000 from the defendants as damages suffered by him by reason of the defendant's wrongful action. In a letter of claim, dated 30th October 1916, the plaintiff's pleader states that the loss is roughly estimated at Rs. 21,000 together with interest due thereon at 12 per cent. per month from the due dates.

The suit came on for trial before Kajiji, J., by consent upon the preliminary issue whether the defendants are protected from liability to the plaintiff under S 75, Railways Act of 1890. That section provides that:

(1) "When any articles mentioned in the Sch. 2 are contained in any parcel or package delivered to a railway administration for carriage by railway, and the value of such articles in the parcel or package exceeds one hundred rupees, the railway administration shall not be responsible for the loss, destruction or deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared or declared them at the time of the delivery of the parcel or package for carriage by railway, and if so required by the administration, paid or engaged to pay a percentage on the value so declared by way of compensation for increased risk."

Schedule 2 referred to in the section under item (i) mentions maps, writings and title deeds. It is contended for the company that upon the plaint it must be taken that the account books were writings of a value exceeding a hundred rupees which was not declared to the railway administration at the time of the delivery of the parcel for carriage, and that consequently the defendants are not responsible for the loss or destruction of the parcel. The learned Judge has held upon the issue that the defendants are not protected from liability to the plaintiff under S. 75 of the Act. He held that the value of articles within Sch. 2 means intrinsic value, and not the value which for some special reason peculiar to the sender he attaches to the articles. The learned Judge also held that the destruction of the books by the Jail Superintendent by reason of which they could not be recovered was not a loss within the meaning of the section. I am of opinion that the learned Judge is right in his interpretation of the word "value" and wrong in his interpretation of the word "loss."

The evidence in the case is that although the plaintiff is suing for Rs. 25,000 which he estimates as his damage

in consequence of the loss of books the value of the books whether as sheets of paper bound together or as books with writing in them does not amount to a hundred rupees. It is apparent from the last item in Sch. 2 that the section is intended to apply to articles of special value declared by the legislature in the schedule or which may be added to the schedule by notification of the Governor-General in Council in the Gazette of India. They must therefore be articles free from any pretium affectionis on the part of the owner, articles, that is to say, which could be valued by any sufficiently trained expert quite apart from the feelings of the owner. The conclusion to be derived from Sch. 2 is further reinforced by the side note to the section in the official publication of the Act. The section is there described as a further provision with respect to the liability of a railway administration as a carrier of articles of special value. It is to be observed also that sub-S. (2) of the section provides that the compensation recoverable in respect of the loss of an article declared under the section shall not exceed the value so declared, and that the burden of proving the value so declared to have been the true value shall lie on the person claiming the compensation. It does not appear to me that the expression "true value" would be appropriate to the value put upon the article by the owner alone, and not by any one else, on account of sentiment or some special use to which he proposed to put the article.

With regard to the second point as to the meaning of the word "loss," it appears to me that it is sufficiently disposed of by a passage in the judgment of Lindley, L. J., in *Millen* v. *Brasch* (1). He says:

> "Let us consider the question apart from authority, and let us take first the case of goods permanently lost. The damage to the owner of goods lost is their value, and possibly in some cases further special damage for their non-delivery in proper time. The damage to the owner of goods never delivered is precisely the same as if they had been lost. The Carrier's Act protects the carrier from liability for loss, and it would simply render the Act nugatory to hold him liable for detention, which is itself the result of the loss for which he is not liable. . . . It is to be observed that the Carriers Act protects the carrier from "liability for the loss of or injury to" undeclared goods the Act does not simply relieve him from paying the value of undeclared goods which he loses; he is relieved from liability for their loss, and it would be to fritter away the Act and to depart from sound principles of construction to hold that "loss" in the Act only means "value" as distinguished from "loss" and its consequences . . .The result comes to this; if goods which ought to be declared and are not declared are lost, whether temporarily or permanently, the carrier is protected from liability for their loss and its consequences."

(1) [1883] 10 Q. B. D. 142.

It was made a ground of complaint in the memorandum of appeal that the learned Judge had disallowed a question put to the plaintiff in cross-examination, namely what amount the plaintiff would have expected to receive from the defendant company had the plaintiff made a declaration as to the value of the articles at the time they were handed to the defendant company for carriage, or, in the alternative, the question what would the plaintiff value the books at as writings when consigned. We allowed the questions to be put to the plaintiff during the argument of the appeal and the plaintiff's answer was that their value was Rs. 60 or 70 and they had less value after the accounts had been written in them than they had when purchased. I am therefore of opinion that the learned Judge was right in holding that S. 75 did not protect the defendants from liability to the plaintiff, since upon the evidence the books were not of the value of a hundred rupees. It is contended on behalf of the plaintiff that the case must now be tried upon the question of what loss or damage the plaintiff has suffered in consequence of the misdelivery of the books. It appears to me to be quite clear both from the passage in the judgment in *Millen* v. *Brasch* (1), which I have just referred to, and from *Crouch* v. *London and North Western Ry. Co.* (2) and *Riley* v. *Horne* (3), that the damages recoverable against the railway company is the value of the property lost and nothing more, and that although S. 75 does not directly protect the railway company since the goods are not of the value of a hundred rupees, it would be entirely inconsistent with the Act to hold that though, if the goods had been of a value exceeding a hundred rupees, the true value would be the limit of the defendants' liability, yet, since the goods are of a value less than a hundred rupees,

(2) [1849] 2 Car & Kir. 789.
(3) [1828] 5 Bing. 217.

the plaintiff may sue for any remote and consequential damage which he may allege he has suffered from the loss.

In my opinion the loss for which the railway company are liable must be estimated by the same measure of damage both in cases under S. 75 and in cases to which S. 75 is not applicable. It is therefore useless to send back the case for evidence and a finding as to the consequential damages the plaintiff may have suffered; to allow any such consequential damage beyond the value of the goods would be to render the Railways Act contradictory and inoperative in regard to goods of small value. Moreover I am of opinion that the plaint in respect of the claim for Rs. 25,000 is demurrable, for that sum is calculated not upon any loss which has actually been suffered but in reference to a heavy loss which the plaintiff says he will be put to in the future. The most that the plaintiff could claim successfully from the railway company having regard to his evidence, is Rs. 70, and that is a sum for which he has not sued and could not sue in the High Court: see Cl. 12. Letters Patent. The appeal is allowed and the suit is dismissed with costs.

**Macleod, J.**—On 16th September 1917 the plaintiff delivered to the defendant railway company at the Victoria Terminus Station, Bombay, a parcel containing twenty-four account-books consigned to the plaintiff's firm at Nagpur. After the parcel had arrived at Nagpur it was delivered, on 19th September, by a mistake of the defendants' parcel clerk to the Superintendent of the Central Jail, Nagpur. The mistake was discovered when the plaintiff's agent came to ask for delivery. Inquiries were made of the Jail Superintendent and it was ascertained that the books had been destroyed. On 30th October the plaintiff's pleader wrote to the defendants that his client estimated the total loss owing to the loss of the account-books at Rs. 25,000, as it had become impossible for him to claim his dues from his various customers either out of Court or by instituting suits. The defendants, on 18th December 1916, repudiated the claim on the ground that the parcel came under the head of "writing", an excepted article under S. 75, Railways Act, and the contents had not been declared and insured. After a further demand was made on 23rd January 1917, defendants wrote declining to entertain the plaintiff's claim. The plaintiff, on 7th September filed this suit stating that owing to the loss and destruction of the books he would be put to a heavy loss which he estimated at Rs. 25,000 and claiming that sum or such other sum as might seem just to the Court as damages.

The defendants in their written statement pleaded that they were protected by S. 75, Railways Act. On 20th December 1917, a consent order was made that the suit should be placed on the Board for the trial of the preliminary issue, viz., "whether the defendants are protected from liability to the plaintiff under S. 75, Railways Act of 1890?" The trial of this issue came on for hearing before Kajiji, J., who decided that the value of the books did not exceed Rs. 100 and that therefore the preliminary issue must be found in the negative. The learned Judge further decided that even if the value of the books was over Rs. 100, the loss occurred after delivery to the wrong person so that S. 75 offered no protection to the defendants. Against this decision the defendants have appealed. S. 75, Railways Act, 1890, runs as follows: S. 75 (1) When any articles mentioned in Sch. 2 are contained in any parcel or package delivered to a railway administration for carriage by railway, and the value of such articles in the parcel or package exceeds one hundered rupees, the railway administration shall not be responsible for the loss, destruction or deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared them at the time of the delivery of the parcel or package for carriage by railway, and, if so required by the administration, paid or engaged to pay a percentage on the value so declared by way of compensation for increased risk. (2) When any parcel or package of which the value has been declared under sub-S. (1) has been lost or destroyed or has deteriorated, the compensation recoverable in respect of such loss, destruction or deterioration shall not exceed the value so declared, and the burden of proving the value so declared to have been the true value shall, notwithstanding anything in the declaration, lie on the

person claiming the compensation. (3) A railway administration may make it a condition of carrying a parcel declared to contain any article mentioned in Sch. 2 that a railway servant authorized in this behalf has been satisfied by examination or otherwise that the parcel actually contains the article declared to be therein."

It is admitted that the account-books come within the meaning of "writings" which are mentioned in Sch. 2. I am of opinion that the loss of the books was caused by the negligent act of the defendants' servant in delivering them to the wrong person, and was not caused after such delivery. Loss includes temporary loss, and it does not matter that by an unfortunate accident after the loss by misdelivery the books were destroyed in the jail: see *Millen* v. *Brasch* (1) and *Smackman* v. *General Steam Navigation Co.* (4). There seems to have been some misapprehension in the mind of the learned Judge when he said that on the true construction of S. 75 loss for which a Railway Company is protected from liability must be loss to the Company. The preamble to the Carriers' Act no doubt refers to the losses to carriers' resulting from their having to pay moneys as compensation for goods lost in the course of carriage, but what they are liable for is the loss by them of the goods. The protection afforded by S. 75 lasts as long as the Railway Company are liable as carriers, and their liability in this case would continue after the goods had arrived at their destination for such reasonable time as would be required for the consignee to come to take delivery. It cannot be contended that the time had expired on 19th September. Then are the defendants protected by S. 75, Railways Act?

In my opinion the mere fact that the plaintiff is claiming more than Rs. 100 for the loss of an undeclared excepted article precludes anything, but an affirmative answer, or in other words, bars him from asserting that its value is under Rs. 100, and the question what was the value of the goods does not arise. The object of this section is to protect a Railway Company from liability for the loss, destruction or deterioration of parcels entrusted to them for carriage containing articles of special value exceeding in value Rs. 100 unless they have notice of the contents, so that (a) they can demand a percentage on the value declared by way of compensation for increased risk, (b) they can take extra precautions for the safe carriage of such parcels. The whole object of the section would be defeated if the consignor could claim consequential damages for the loss of an excepted article without insuring it, on the ground that its market value was under Rs. 100. The fallacy of this argument lies in thinking that loss and damages resulting from the loss can be distinguished, so that although the loss may be within the section the damages resulting from the loss are without it.

The question of value in the first instance can only arise when a claim is made against a Railway Company for a sum below the limit and the Company pleads that the value of the article exceeds the limit, as in *Stoessiger* v. *South Eastern Railway Co.* (5), where it was held that an embryo bill of exchange without the name of the drawer was of no value until filled up by the drawer and in *Blankensee* v. *London and North-Eastern Railway Co.* (6), where the Company pleaded successfully that the value of certain jewellery consigned was the price obtained by the consignor and not the price he paid. Coleridge, C. J., said " 'Value' means the value to the consignor of the goods", and Manisty, J., said; "Suppose the Act of Parliament had never passed, . . . and the parcel had been lost, can any one doubt but that the plaintiffs in an action . . . could have recovered the amount which the article was worth to them?" These dicta are important as showing that "value" need not necessarily mean "market value". No doubt in many cases the value of an article to the owner is the "market value", but it would be easy to enumerate articles within Sch. 2 such as plans and manuscripts which may have a special value to the owner beyond the market value, and it seems obvious to me that if he wishes to recover this value he must declare and insure the goods. If however a loss occurs the liability of the Company is limited by S. 75 (2) to the true value. And whether the "true value" is the "market value" or some special value

(4) [1908] 18 Com. Cas. 196.

(5) [1854] 3 El. & Bl. 549.

(6) [1881] 45 L. T. 761.

which the consignor can prove, the goods were worth to him, is a question which I do not think has yet been decided. The most instructive case of all those cited to us is *Millen* v. *Brasch* (1). The plaintiff's agent delivered to the defendant a trunk to be sent by rail to Liverpool and there shipped by steamer to Italy. By mistake the defendants shipped it to America. The trunk contained, amongst other things, silk dresses and a sealskin jacket, excepted articles within the Carriers' Act and of a value over £ 10. The plaintiff claimed £ 210 for the loss of the trunk and injury to its contents. Thereafter the defendants recovered back the trunk and delivered it to the plaintiff. They admitted there had been miscarriage, loss of time and injury to the contents. In the lower Court it was held that the goods were lost though the loss was only temporary, that the defendants were liable for the injury to articles under the value of £ 10 but not for the injury to articles over the value of £10. Still for the detention, of those articles £5 were awarded as damages. On appeal the Court differentiated the case of *Hearn* v. *London and South Western Railway Co* (7). where the Company had been held liable for detention as there the goods had not been lost. It was held that as the goods were found to have been lost it was impossible to hold the carriers liable for detention caused by loss. The Act protected carriers from liability for the loss or injury to undeclared goods and did not simply relieve them from paying the value of undeclared goods which they lost. They were relieved from liability for their loss and it would be to fritter away the Act and to depart from sound principles of construction to hold that loss in the Act only meant value as distinguished from loss and its consequences.

No doubt in that case the value of the goods was admittedly over £10, but the the remarks above quoted appear to be an authority for the proposition that a consignor cannot say. "The loss of the articles is one thing and the consequences of the loss are another, so that I can sue for the consequential damage without insuring the goods." It must follow that when a consignor makes a claim against a carrier for the loss of excepted goods and the consequences of the loss, he is claiming the value of the goods to him and if his claim is over Rs. 100 he cannot be allowed to say that the loss and the consequences of the loss to anyone else would not be worth Rs 100 and that therefore he was not bound to declare and insure them. That this argument is correct admits of a very simple proof. The plaintiff says "value" means "cost price", Supposing this parcel had contained account books which had cost Rs. 110 and the plaintiff had not declared them under the Act, it is obvious that the Company would have been protected from liability for their loss and the consequences of their loss. If the plaintiff had declared them he could not have recovered more than Rs. 110. Supposing, again, the plaintiff had said to the defendants when the books were consigned. "these books are of the value of Rs. 60 or Rs. 70 but if they are lost I may suffer damages to the extent of Rs. 25,000 and if you lose them I shall claim that amount from you." Is it conceivable that the defendants would not have been entitled to refuse to carry them and be responsible for their loss unless a percentage were paid to cover the increased risk? If the plaintiff's contention were correct the company would have been bound to carry the books at the ordinary rates. It would be a reductio ad absurdum to hold that the Railway Company might be liable to an unlimited extent for the loss of an excepted article under the value of Rs. 100, while their liability for the loss of such an article over the value of Rs. 100 was limited to the declared value.

In my opinion S. 75 is an absolute bar to an action against a Railway Company for any amount exceeding Rs. 100 for the loss and the consequences of the loss of excepted goods entrusted to them for carriage unless a declaration has been made under the section. Otherwise the risk attached to the carriage of undeclared excepted goods would become intolerable. I agree with the learned Chief Justice, though on somewhat different grounds, that the appeal should be allowed and suit dismissed with costs.

G.P./R.K. *Appeal allowed.*

(7) [1855] 10 Ex. 798.

## * A. I. R. 1919 Bombay 73

HAYWARD, J.

*Dossabhai Hirchand*—Plaintiff.

v.

*Virchand Dalchharam* and *another*—Defendants.

Original Suit No. 684 of 1917, Decided on 18th November 1918.

**(a) Negotiable Instruments Act (1881), S. 1—Mercantile usage.**

Mercantile usage, however extensive, should not be allowed to prevail if contrary to positive law: *Goodwin* v. *Roberts*, (1875) 10 *Ex.* 337, *Rel. on.* [P 73 C 2]

*** (b) Negotiable Instruments Act (1881), Ss. 13 and 1—Cheque—Cheque with word "bearer" struck out and without word "order" being substituted for it is not an "order" cheque and is not negotiable—Usage in Bombay to contrary cannot be recognized.**

A cheque with the word "bearer" struck out and without the word "order" being substituted for the word "bearer" cannot be regarded as an "order" cheque and therefore, is not negotiable. Such a cheque has been regarded hitherto by the custom and usage of Bombay as a negotiable instrument, but such a usage cannot be recognized as, if recognized, it would override the express provisions S. 13, inasmuch as it would be an extension of the definition of "negotiable instrument" contained in that section. [P 73 C 2]

**(c) Negotiable Instruments Act (1881), Ss. 1 and 13—Act is intended to lay whole law regarding cheques, bills of exchange and promissory notes—S. 13 is exhaustive definition of negotiable instruments.**

The Negotiable Instruments Act, 1881, was prima facie intended to lay down the whole law regarding cheques, bills of exchange and promissory notes. Likewise S. 13 of the Act was prima facie intended to be an exhaustive definition of those three classes of negotiable instruments. [P 74 C 1]

*Strangman* and *J. D. Davar* — for Plaintiff.

*B. J. Desai* and *M. C. Setalvad*—for Defendant.

**Judgment.**—The plaintiff firm Dossabhai Hirchand brought this summary suit as endorsees to recover the amount of Rs. 4,000 due upon a cheque drawn by defendant 1 firm Virchand Dalchharam in favour of defendant 2 firm Hargovan Jeychand on the Bank of India, Ltd. Defendant 1 firm pleaded that the suit as framed would not lie as the cheque had the word "bearer" struck out and there was no substitution of the word "order" and that therefore the cheque was not negotiable within the meaning of the Negotiable Instruments Act. Defendant 2 firm did not obtain leave to defend, though one Parbhudas denied that he was a partner in defendant 2 firm. The plaintiff, thereupon, alleged a custom and usage of merchants, whereby a cheque with the word "bearer" struck out and without the word "order" was regarded as an "order" cheque and negotiable in Bombay. The first defendant firm replied that no such usage of merchants even if proved, could be recognized as it would override the express provisions of the Negotiable Instruments Act.

Now, the alleged custom has been spoken to by a number of witnesses, and no reason has been shown to reject their statements. They were the Chief Accountants of the Bank of India and of the Central Bank: the Assistant Accountants of the Chartered Bank of India, Australia and China, of the National Bank of India, of the Mercantile Bank of the Hongkong and Shanghai Banking Corporation and of the International Bank; and no evidence has been forthcoming in rebuttal of their statements. It would appear clear therefore that the alleged usage does exist among merchants and bankers in Bombay. But it is equally clear that the custom and usage of regarding such a cheque as an "order" cheque, if recognized, would be an extension of the definition of "negotiable instruments" contained in S. 13, Negotiable Instruments Act, 1881. That definition would appear to have been framed upon the old law in England as laid down by Tindal, C. J. in the case of *Plimley* v. *Wesley* (1). It did not include the rule that an instrument:

"which is expressed to be payable to a particular person and does not contain words prohibiting transfer or indicating an intention that it should not be transferable,"

should be deemed an instrument payable to "order" as prescribed by Cl. (4), S. 8 of the later Bills of Exchange Act, 1882, 45 & 46, Vic. C. 61. But it has been laid down by indisputable authority that usages contrary to positive law will not be recognized by the Courts. Cockburn, C. J., said:

"We must by no means be understood as saying that mercantile usage, however extensive, should be allowed to prevail if contrary to positive law ..... To give effect to a usage which involves a defiance or disregard of the law would be obviously contrary to a fundamental principle,"

in the leading case of *Goodwin* v. *Roberts* (2). The question therefore for

(1) [1835] 2 Bing. (n. c.) 249.
(2) [1875] 10 Ex. 337.

decision here is whether the mercantile usage extending the definition of "negotiable instrument" has involved a defiance or disregard of the provisions of the Indian Negotiable Instruments Act. It has, in the first place, to be observed that the Act, according to the preamble, was passed not merely to amend the law but to define it in respect of cheques, bills of exchange and promissory notes. It was, therefore prima facie intended to lay down the whole law regarding those three classes of negotiable instruments. It has in the second place, to be observed that the saving clause in S. 1 saved only local usage relating to instruments in oriental languages such as Hundis, and did not save general usage like S. 1, Contract Act. It has thirdly, to be observed that S. 13 made use of the word 'means" and not of the word "includes," and was therefore prima facie intended to be an exhaustive definition of those particular classes of negotiable instruments.

And that is the view which was apparently taken by Farran, J., when he referred to the saving clause in S. 1 and the definition in S. 13, at pp. 699 and 697 of the case of *Jetha Parkha* v. *Ramchandra Vithoba* (3). It has been suggested that nevertheless it would be permissible to extend the definition though perhaps not to restrict it. But it seems to me that when the definition declared that certain forms of cheques, bills of exchange and promissory notes were meant by the term "negotiable instrument," it impliedly indicated that no other forms should be included among "negotiable instruments," upon the principle "*expressio unius exclusio alterius.*" applicable generally to the interpretation of statutes. It has been urged that extensions have been permitted, as in the case of railway receipts by this Court upon the strength of the provisions of S. 137, Transfer of Property Act. But the provisions of that section do not seem to me to be any authority for extending the definition of cheques, bills of exchange and promissory notes specifically within the scope of the Negotiable Instruments Act. It seems to me to be merely authority for extending the incidents of negotiability to such other instruments like railway receipts as have been excluded by S. 137 from the operation of Ch. 8, T. P. Act, and as have not been made subject to the legislation of the Negotiable Instruments Act. It seems to me therefore that it is not open to me to give legal recognition to the usage proved in this particular case, as that would be in defiance and disregard of the express provisions of the Negotiable Instruments Act 1881. If it should be desired by merchants and bankers that that particular usage should be legally recognized, then their proper course would be to apply for an amendment of the Indian Negotiable Instruments Act, 1881, so as to bring it into line with the the later English Statute of 1882. Such an application however would have to be made not to this Court but to the Indian legislature. (The rest of the judgment is not material to this report—Ed.)

(3) [1892] 16 Bom. 699.

G.P./R.K. *Suit dismissed.*

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## A. I. R. 1919 Bombay 74

SCOTT, C. J. AND SHAH, J.

*Chinto Mahadeo Khandekar* — Appellant.

v.

*Madhav Ramchandra Patkar* — Respondent.

Second Appeal No., 838 of 1916, Decided on 19th November 1918, from decision of Asst. Judge, Ratnagiri, in Appeal No. 254 of 1914.

**Bombay Khoti Settlement Act (1 of 1880), S. 20—Person relying on entry declared to be not occupancy tenant in previous suit between same parties — Rule that settlement register entry is conclusive does not apply.**

The rule of evidence laid down in S. 20, Khoti Settlement Act, that the entry in the settlement register purporting to record the fact that the interest of any occupany tenant is not transferable shall be conclusive evidence, cannot apply where, according to a judgment inter partes, the person relying on the section is not an occupancy tenant; for the fact of the tenancy of the individual is not conclusively settled by the entry. [P 75 C 2]

*H. C. Coyajee* and *B. G. Kher*—for Appellant.

*K. N. Koyajee*—for Respondent.

**Scott, C. J.**—Thirty thikans of khoti land in the jurisdiction of the Rajapur Court were held prior to 1883 by the Khandekar family as occupancy tenants. Seven of these thikans were attached and sold by Vithal Haldvenkar as mortgagee of the khoti interest under a decree for payment of the khot's dues which had been obtained against Yessaji Khandekar. Vithal purchased the attached interests

by a benami sale and having taken a transfer obtained possession from the Khandekars. This led to litigation in which Yessaji's brothers claimed that the sale did not affect 5/6ths of the occupancy rights in these thikans. At that time the Khoti Act (S. 9) provided that occupancy right should be heritable but not otherwise transferable, "unless in any case the tenant proves that such right of transfer has been exercised in respect of the land in his occupancy independently of the consent of the khot at some time within thirty years next previous to the commencement of the revenue year 1865-65." The question of transferability was not discussed in the first Court which decided adversely to the contention of Yessaji's brothers, but it was apparently considered in the first appellate Court where it was stated by the Judge that as a matter of custom it must be held that this (occupancy) right was transferable as it had been actually sold through the Court at the instance of the khot.

The learned Judge held however that the decree and sale of Yessaji's interest would not affect the interests of his brother. On second appeal in the High Court it was assumed that the property could be sold under a decree for the khot's dues and it was held that in fact the interest of all' the parties had been sold. The result was that Vithal as purchaser acquired the whole of the interest of the occupancy tenants in these thikans. The Khandekars therefore could not as against Vithal and his assigns assert title as occupancy tenants. By various mesne assignments Patkar, defendant 1 in the first suit (who is plaintiff in the second suit), has become the owner of the interests acquired by Vithal in 1883. Defendant 1 in Suit No. 53 of 1912 is sued by one of the Khandekars in respect of four of the seven thikans now in his possession, while in Suit No. 290 of 1913 he sues the Khandekars for the possession of the other three thikans.

Both suits are occasioned by the mamlatdar's decrees for possession against the respective plaintiffs. Both suits have been decided in the lower Courts against the Khandekars. In these appeals it is contended that whether or not the decision in the suit of 1885 against Vithal decided that the Khandekars' interests were validly transferred to him, the subsequent assignments under which their opponent Patkar claims title are invalid under the Khoti Act, S. 9. This however would not profit the plaintiff Khandekar in Suit No. 53 of 1912 (who suing in ejectment must prove his title), unless he can show that he is an occupancy tenant. He is however precluded from agitating a claim as occupancy tenant in a Court of law against Hari or his assigns by the decision that the occupancy rights of the Khandekars had been sold to Hari: S. 40, Evidence Act and S. 11, Civil P. C. The rule of evidence laid down in S. 20, Khoti Settlement Act, that the entry in the settlement register purporting to record the fact that the interest of any occupancy tenant is not transferable shall be conclusive evidence, cannot apply where according to a judgment inter partes the person relying on the section is not an occupancy tenant; for the fact of the tenancy of the individual is not conclusively settled by the entry.

In Suit No. 290 of 1913, where Patkar is the plaintiff and the Khandekars are tenants, the same estoppel by judgment prevents the latter from asserting an occupancy tenure and it is held as a fact that the Khandekars were in possession for many years since 1890 as ordinary and not occupancy tenants. They cannot therefore resist the claim of the plaintiff who has acquired the title of those to whom the Khandekars attorned as tenants.

The result is that the decree of the lower appellate Court is affirmed and the appeals dismissed with costs in both cases.

G.P./R.K. *Appeal dismissed.*

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## A. I. R. 1919 Bombay 75

SHAH, J.

*Mahadeo Gopalbhat*—Defendant—Appellant.

v.

*Trimbakbhat Balambhat*—Plaintiff—Respondent.

Second Appeal No. 502 of 1916, Decided on 3rd September 1918, from decision of Dist. Judge, Nasik, in Appeal No. 297 of 1915.

**Civil P. C. (1908), S. 11 — Execution proceedings—Any point not heard and decided but which might have been raised cannot be necessarily treated as decided under S. 11.**

The rule of res judicata applicable to execution proceedings makes all decisions given in such proceedings binding upon the parties in subsequent proceedings, but it does not necessarily in-

volve the result that any point which is not heard and decided, but which might and ought to have been raised, must be treated as necessarily decided as under S. 11.

Where a proceeding, which is relied upon as saving limitation for the execution of a decree, might have been made a ground for saving an earlier application for execution which was dismissed as barred by time but was not so made a ground and no decision was given on the point, the application of the doctrine of res judicata to execution proceedings would not involve the result that it should be taken to have been decided. [P 77 C 1]

An application for execution of a decree was dismissed as barred by time. In a subsequent application for execution the decree-holder relied upon certain earlier proceedings and acknowledgments as saving limitation:

*Held*: that the dismissal of the earlier application for execution operated as res judicata only so far as the question of the maintainability of that application was concerned and that the grounds relied upon by the decree-holder as saving limitation in respect of the subsequent application not having been adjudicated upon in the previous proceeding, could not be regarded as res judicata. [P 78 C 1]

*K. H. Kelkar*—for Appellant.

**Judgment.**—This appeal arises out of execution proceedings. The decree under execution was passed on 12th December 1910. It was a partition decree in which the shares of the plaintiff and the defendants were determined. Defendant 4 made an application, No. 789 of 1914, for execution of the decree, on 2nd November 1914. That application was rejected as time barred. The order made thereon was in these terms: "The darkhast was given on 2nd November 1914. The decree was passed on 12th December 1910. It is therefore not in time under Art. 182, Lim. Act. The applicant says that it is in time because defendant 5 had given some darkhasts to execute the decree against some defendants within three years from the date of the decree and this darkhast was given within three years from those darkhasts. This statement itself is too vague. He does not give even the numbers of the darkhasts or their dates. He produces no copies to show them. His pleader fails to show that it is in time. It is therefore rejected with costs as time barred." The present application for execution was made on 13th January 1915 and he pleaded that it was within time in consequence of certain earlier applications made by other parties and that there were acknowledgments of the liability under the decree by some of the defendants. On this the following issues were raised by the Court of first instance: (1) Does the applicant prove that the darkhast is in time as alleged by him? and (2) Whether in view of the order in darkhast No. 789 of 1914, the point of the present application being in time, is not res judicata. The learned Second Class Subordinate Judge was of opinion that the darkhast was in time but rejected it on the ground that the order in Darkhast No. 789 of 1914 operated as res judicata. Defendant 4 appealed to the District Court and the learned District Judge, agreeing with the Subordinate Judge, came to the conclusion that the order in the said darkhast operated as res judicata and dismissed the appeal summarily without expressing any opinion as to whether, apart from the plea of res judicata, the application would be in time.

Defendant 4 has preferred this appeal against the decree of the lower appellate Court and has contended that the order in the darkhast of 1914 cannot operate as res judicata. The respondents have not appeared, though they have been served, and I have not had the advantage of hearing any argument in support of the view which has found favour with the lower Courts. The point is by no means free from difficulty. It seems to me however that the true reading of the order made on the darkhast of 1914 involves the result that the question whether the present darkhast is in time as alleged by the applicant is not res judicata. Any order previously made in execution proceedings would undoubtedly be binding upon the parties in all subsequent proceedings and would operate as res judicata. The ground upon which such an order is binding upon the parties is thus stated in the case of *Ram Kirpal* v. *Rup Kuari* (1): "It was as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as final judgment in a suit is binding upon them in carrying the judgment into execution. The binding force of such a judgment depends not upon S. 13, Act 10 of 1877, but upon general principles of law. If it were not binding there would be no end to litigation." That is, as I understand the observations, the provisions of S. 11 of the Code do not in terms apply to an

(1) [1884] 6 All. 269=11 I. A. 37=4 Sar. 489 (P.C.).

order made in execution proceedings but that anything decided by that order must be treated as binding upon the parties in the subsequent proceedings. If it was essential for the plaintiff to rely upon the darkhast of 1914 as being in time, undoubtedly he would be prevented from showing that that darkhast was not barred by limitation as it was in terms rejected as time barred. But the order does not purport to decide the question as to whether any other darkhasts and acknowledgments, such as are now relied upon, are sufficient to save the present application. No doubt if the principle of Expln. 4, S. 11 were applied, it would mean that the Court in dismissing the application of 1914 decided that the other applications and acknowledgments were not sufficient to save limitation. The rule of res judicata applicable to execution proceedings makes all decisions binding upon the parties in subsequent proceedings, but it does not necessarily involve the result that any point which is not heard and decided but which might and ought to have been raised must be treated as necessarily decided as under S. 11 of the Code. No doubt the proceedings now relied upon as saving limitation might have been made a ground for saving the application of 1914. But if it is not made a ground and if there is no decision on the point, I do not think that the application of the doctrine of res judicata to execution proceedings would involve the result that it should be taken to have been decided. At least, as I read the decisions bearing on this point, I do not understand the rule to go so far. As it is not essential, for the purpose of determining whether the present application is in time or not, for the plaintiff to establish that the application of 1914 was in time, I do not think that the rejection of that application on the ground that it was not shown to be within time can operate as decisive of the question whether the other applications and acknowledgments, which are now brought to the notice of the Court, are in fact sufficient to save limitation.

The two cases which have been relied upon by the Court of first instance are in my opinion distinguishable on their facts. In the case of *Bandey Karim* v. *Ramesh Chunder Bundopadhya* (2) the facts show that the execution of the decree was held to be barred prior to the application in which the question as to res judicata arose and the learned Judges distinctly observed : " We do not, on the present occasion, propose to go into this broad, general and probably difficult question whether the principle of res judicata as enunciated in S. 13, Civil P. C., applies in all its generality to proceedings after decree. We limit our decision to the exact question which is raised in the present case, and that is whether the Court having once decided that the execution is barred by limitation that decision is a bar to further execution."

Similarly in *Manjunath Badrabhat* v. *Venkatesh Govind Shanbhog* (3) it appears from the facts of the case stated at p. 62 that the previous decision expressly related to the application of 30th November 1871 and that it was based on the ground that the execution of the decree was barred as more than three years had elapsed between the first and the second application, that is, between the applications of April 1868 and November 1871. The very question which was decided then was raised by the decree-holder in the subsequent proceedings and the learned Judges held that the application of 30th November 1871, which was on a previous occasion held to be time barred, could not be held in subsequent proceedings to be within time or rather that that decision could not be reconsidered and must be accepted as final and binding upon the parties. It does not appear that apart from the application of 30th November 1871, in that case the decree-holder could have successfully pleaded that his application for execution then under consideration would be within time.

I have been referred to the decisions in *Delhi and London Bank* v. *Orchard* (4) and *Mungal Pershad Dichit* v. *Grija Kant Lahiri* (5). In the first of these two cases, with reference to the order of 10th December 1869 their Lordships observed as follows : " It was contended that the rule of res judicata applied, and that the application made on 4th May 1871 was barred by the order of the Deputy Commissioner of the 10th day of December 1869 from which no appeal was preferred. But their Lordships are of

(2) [1883] 9 Cal. 65.

(3) [1881-82] 6 Bom. 54.
(4) [1877-78] 3 Cal. 47=4 I. A. 127 (P.C.).
(5) [1882] 8 Cal. 51=8 I. A. 123 (P.C.).

opinion that the order of the 10th day of December 1869 was not an adjudication within the rule of res judicata, or within S. 2, Act 8 of 1859." The terms of the order are set forth in the judgment at pp. 131 and 132. In *Mungal Pershad's* case (5) the previous order then under consideration has been referred to at p. 131 of the report in these terms: "Here an order for attachment was made by the Subordinate Judge on 8th October 1874 after notice served on the judgment-debtor on 23rd September 1874 to show cause why the decree should not be executed against him. The order was made by a Court having competent jurisdiction to try and determine whether the decree was barred by limitation. No appeal was preferred against it; it was acted upon, and the property sought to be sold under it was attached and remained under attachment until the application for the sale now under consideration was made." That order was held to be binding upon the parties. I do not think that either of these decisions conflicts in any way with the view which I take of the order on the application of 1914 in the present case. The distinguishing feature of the present case is that it is not essential for the appellant to question the adjudication as to the application of 1914 in order to save the present application. As I read the order there is no adjudication that the execution of the decree was barred but only that the particular application was not shown to be in time. To that extent and to that extent only the adjudication is binding upon the parties, and in my opinion the doctrine of res judicata in execution proceedings could not be carried further so as to make this adjudication equivalent to an adjudication that the other applications and acknowledgments now relied upon were not sufficient to save limitation.

On these grounds I am of opinion that the question whether the present application is in time is not res judicata and that the question must be determined on its merits. I would accordingly allow the appeal, set aside the decree of the lower appellate Court, and remand the appeal for disposal according to law. Costs here to be costs in the appeal.

G.P./R.K. *Appeal allowed.*

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## * A. I. R. 1919 Bombay 78

SCOTT, C. J. AND SHAH, J.

*Gulam Gous Mia Khot* and *others* — Plaintiffs—Appellants.

v.

*Shriram Pandurang Jairamrao*—Defendant—Respondent.

Second Appeal No. 826 of 1917, Decided on 15th October 1918, from decision of Asst. Judge, Thana, in Cross-Appeals Nos. 309 and 315 of 1915.

*** Limitation Act (9 of 1908), Ss. 6, 7 and Art. 144—Mortgage by Mahomedan in 1895—Sale of equity of redemption by widow to mortgagee in 1901—Suit for redemption in 1914 by sons and daughters who had except one attained majority before three years Widow could pass only her 1/8 share—Equity of redemption being indivisible and one plaintiff being within time, whole suit held within time.**

**In 1895 a Mahomedan mortgaged certain property to the defendant. In 1901 the mortgagor being dead, his widow purported to sell the equity of redemption to the mortgagee. In April 1914 the son and daughters of the mortgagor filed a suit for redemption of the mortgage. It appeared that all the plaintiffs except one had attained majority more than three years prior to the institution of the suit:**

***Held***: **(1) that the sale of the equity of redemption by the mortgagor's widow could only operate to transfer her 1/8th share in the property; (2) that the right to redeem being indivisible, neither of the plaintiffs who had attained majority more than three years before the institution of the suit was qualified to discharge or release the equity of redemption, and that therefore the suit, having been brought within three years of the date when the youngest plaintiff attained majority, was within time, having regard to the provisions of S. 7, Limitation Act.**

*W. B. Pradhan*—for Appellants.

*P. B. Shingne*—for Respondent.

**Scott, C. J.**—Mia Khot in 1895 mortgaged the property in suit to Jairam, the father of defendants 1 and 2. In 1901 the mortgagor being dead, his widow purported to sell the equity of redemption to Jairam. Jairam subsequently sold his interest in the property to defendant 3. The sale by the mortgagor's widow could only transfer her 1/8th share as a Mahomedan widow to the mortgagee: the remaining 28/32nds in the equity of the redemption belonged to the plaintiffs, the son and daughters of the deceased. The present suit was filed on 21st April 1914 for redemption. The defence is that the suit is, as to all the plaintiffs' interests except that of plaintiff 2, barred by limitation because Jairam obtained possession at the time of the sale. Plaintiff 3 was a major at that

date and plaintiff 1 became a major in May 1908 and did not sue for redemption or possession within three years. The lower Court has held the suit barred as regards plaintiffs 1 and 3 under Art. 144 read with S. 6, Limitation Act, on the ground that the possession of Jairam became adverse in 1901.

This conclusion however appears to be inconsistent with S. 7, Limitation Act, according to which, where out of several persons jointly entitled to sue one is under disability and a discharge cannot be given in respect of the cause of action by any other of them, time will not run until the disability has ceased. Here the cause of action in the plaintiffs is the equity of redemption. The mother has not discharged and was not qualified to discharge it. Chitty J., in *Bolton* v. *Salmon* (1) said:

"Where a mortgage is made by two tenants-in-common, both of them must be parties to the action to redeem; one cannot redeem in the absence of the other. Where two different estates are mortgaged, the person entitled to redeem one estate cannot bring an action to redeem without making the person entitled to redeem the other estate a party: see *Cholmondeley* v. *Clinton* (2). For this purpose there is no difference between a mortgage of two different estates or two undivided shares of the same estate."

For this reason neither of the plaintiffs who attained majority more than three years before the date of the institution of this suit was qualified to discharge or release the equity of redemption. The right was indivisible and the suit having been brought within three years of the date when the youngest plaintiff attained majority is within time.

**Shah, J.**—I concur. I desire to add that even treating the possession of the mortgagee and his transferee as the possession of a purchaser and not that of a mortgagee, I think the result would be the same. The plaintiffs as cosharers would be jointly entitled to sue him in respect of their shares for partition, and none of them would be competent to give a discharge in respect of the whole interest not vested in the purchaser. Thus under S. 7, Limitation Act, the right of the three plaintiffs to recover possession of 28/32nds share in the property would be within time, as the claim of one of them, who was under a disability, is within time. The purchaser in possesion would be equitably entitled to have his right under the simple mortgage satisfied before he can be called upon to part with his possession. The result is substantially the same as if he were a mortgagee in possession, with this difference that he may not be liable to account as a mortgagee in possession.

G.P./R.K. *Appeal allowed.*

(1) [1891] 2 Ch. 48.
(2) [1820] 2 J. & W. 1.

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## A. I. R. 1919 Bombay 79

HEATON AND PRATT, JJ.

*Vasudeo Pundlik Saman* — In re.

Criminal Appln. No. 283 of 1918, Decided on 6th December 1918, from order of Dist. Magistrate, Ratnagiri.

**(a) Bombay Village Police Act (1867), S. 14—Complaint to village patel for offence committed on sea—Patel has no jurisdiction under S. 14.**

A complaint was presented to a village patel against the captain of a steamer. The allegation was that the captain had abused the complainant on board the steamer at some distance from the shore:

*Held*: that the patel had no jurisdiction in the matter under S. 14, Bombay Village Police Act. [P 79 C 2]

**(b) Criminal P. C. (1898), S. 439—High Court cannot quash proceedings before village patel under Criminal P. C. but under general powers of superintendence conferred by Letters Patent, Cl. 28**

The High Court of Bombay has no power under the Criminial Procedure Code to quash proceedings before a village patel, but it has power to do this under the general powers of superintendence conferred upon it by the Letters Patent. [P 79 C 2 P 80 C 1]

*K. S. Parulekar*—for Complainant.

**Heaton, J.**—It appears that a complaint has been presented to the village Patel of Malwan against the captain of a steamer. The allegation is that the captain abused the complainant. It appears that this occurred on the steamer which was at some distance from the shore. Consequently it appears to us very doubtful whether the patel has jurisdiction in the matter. For he only has jurisdiction under S. 14, Bombay Act 8 of 1867, the matter of a person charged with committing, within the limits of the village, petty assault or abuse. A mile and a half or two miles out at sea would hardly seem to be within the limits of the village. We think therefore that these proceedings should be quashed, and though we may not have power under the Criminal P. C. to quash them having regard to the dscision in *Dayal Kanji In re* (1), yet we think we have power to

(1) [1908] 10 Bom. L. R. 630.

do this under the general powere of superintendence which are conferred on us by the Letters Patent of this Court. We therefore quash the proceedings before the patel. Tha District Magistrate suggested that the case should be transferred to some Magistrate whose powers have been conferred under the provisions of the Criminal P. C. However as I have already stated, we have decided to quash the proceedings so that the transfer is unnecessary. If the complainant is so minded, he can of course present a complaint to a regular Magistrate.

**Prart, J.**—I concur. I would only add that in my opinion having regard to S. 1, Criminal P. C., which makes that Code inapplicable to village police officers, we have no power of transfer under S. 526. Nor do I think that the case is one in which we should exercise this power under Cl. 29, Letters Patent. The complainant, if so advised, would be at liberty to file an appropriate complaint before a Magistrate having jurisdiction, that is to say, if the facts he alleges constitute something more than abuse and do amount to on offence under the Penal Code.

G.P./R.K. *Proceedings quashed.*

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## A. I. R. 1919 Bombay 80

MARTEN, J.

*Sarabai Amibai*—Petitioner.

v.

*Cassum Haji Jan Mahomed*—Opposite Party.

Original Civil Suit No. 10 of 1918, Decided on 22nd August 1918.

**(a) Mahomedan Law — Applicability — Cutchi Memons—Wills.**

Cutchi Memons are governed by Mahomedan law as regards the execution of their wills. [P 80 C 2]

**(b) Mahomedan Law—Will—Attestation.**

Under the Mahomedan law no attestation of a will is necessary. [P 80 C 2]

**(c) Probate and Administration Act (1881), S. 3—Document drawn up by testator giving instruction to legal adviser is good will.**

A document drawn up by a testator in the nature of instructions to his legal adviser or to his relative as to the instructions to be given to the legal adviser as to the disposition of his property is a good will and should be admitted to probate. [P 81 C 1]

*Kanga*—for Petitioner.

**Judgment.**—This is a curious case. The petitioner who is the widow of a Cutchi Memon applies for probate of a document as being the last will and testament of her deceased husband, which document is in the following terms according to the official translation : "May it be known to Bhai Abdulabhai as follows : In the will which you will get made to-morrow and give me, be kind not to forget (to add) my "mukhatyari" as long as I am alive and after me my wife's "mukhatyari". Whatever costs may be incurred I will pay you. Written by your servant Mahomed Hasam Haji." On the other side : "Bhai Abdulabai, "mukhatyari, I should explain, means absolute ownership or authority or full power." Now this gentleman Abdulabhai is the testator's deceased sister's husband; in other words, his brother-in-law. He has made an affidavit and I have also seen him in the witness-box, and I may say that I am satisfied that this document was written by the testator and given to the witness under the circumstances stated in his affidavit. The testator was a Cutchi Memon and in some respects Cutchi Memons are governed by Hindu law. Further, the document in question is not attested. But I think it is quite clear, and at any rate there is an express authority of this Court precisely in point, that Cutchi Memons are governed by Mahomedan law as regards the execution of their wills, and that under Mahomedan law no attestation is necessary. The case I refer to is *Aba Satar Haji Aboobuker, In re* (1) and is a decision of Tyabji, J. So far therefore as that point is concerned, I think no difficulty arises.

But the point on which I have felt difficulty was whether this document can fairly be regarded as a will. Having regard to who the testator was, all we are concerned with is the Probate and Administration Act. Under S. 3 of that Act the definition of will is : "Will' means the legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death." The declaration must therefore be a "legal declaration." But I see nothing here which, according to Mahomedan law, is illegal. In fact by that law an unsigned declaration or even an oral declaration is sufficient. The document in question is therefore a legal declaration, and prima facie it would seem to be a declaration of "his intentions with respect to his property which he desires to be carried into effect after his death." It is true that this

(1) [1905] 7 Bom. L.R. 558.

document might be construed and probably is in the nature of instructions to his legal advisers or to his relative as to the instructions to be given to the legal advisers as to the disposition of the property, but as to that I think one may compare what is said in Mayne's Hindu Law, Edn. 8, p. 588: "So a paper drawn up in accordance with the instructions of the testator, and assented to by him, will be a good will, though not signed. And if a paper contains the testamentary wishes of the deceased, its form is immaterial. For instance, petitions addressed to officials, or answers to official inquiries have been held to amount to a will ... Similarly a matrimonial arrangement deed and a deed of assignment have been held to operate as a will."

In a case before the Privy Council of *Mahomed Altaf Ali Khan* v. *Ahmad Buksh* (2) a document there, which was a power-of-attorney having an expression of what was to be done with the property after the death of the person giving the power was held to operate as a will. Further, it seems to be the case that if the solicitor had drawn up the document in accordance with the intention of the testator as being his will and he had assented to that, that would have been a valid will although not signed by him. Here we have the converse case for we get the original instructions of the testator to the solicitor. I think therefore that his original instructions should be as valid as the more formal document that the solicitor would, in the ordinary course, have drawn up in accordance with those instructions. Abdulabhai, as I have said, has been in the box and he says that he told the testator that he would send for the vakil the next day and prepare a will to that effect, that is to say, to the effect mentioned in the document in question. I think this shows that the document really contained the testamentary intentions of the testator. I should perhaps explain that the reason for all this was that the testator was lying on his death-bed suffering from cancer of the tongue and was unable to speak properly at the time and that he died two days after the date of this letter.

On the whole, although this case is near the line, I think that, having regard to the fact that the parties are Mahomedans, this document was a valid will and may be admitted to probate accordingly. I should have mentioned that there was at one time a caveat lodged by the testator's brother disputing the document as a will. That caveat has been withdrawn and I dare say the reason for it is that probably at a subsequent stage it will be contended that all the widow takes under the document is a Hindu widow's estate. If that contention is correct, the question is largely academic whether this is a good will or not, for the property will devolve in the same way as on an intestacy. But as I have intimated, in my view, it is a good will and accordingly I admit it to probate. Caveat dismissed.

G.P./R.K. *Caveat dismissed.*

(2) [1867] 25 W.R. 121.

1919 B/11 & 12

## A. I. R. 1919 Bombay 81

HEATON AND PRATT, JJ.

*Daudbhai Allibhai*—Plaintiff—Appellant.

v.

*Daya Rama*—Defendant—Respondent.

Second Appeal No 559 of 1917, Decided on 26th November 1918, from decision of Joint First Class Sub-Judge, A. P., at Surat, in Appeal No. 49 of 1914.

**(a) Civil P. C. (5 of 1908), S. 11—Suit for ejectment and rent — Permanent tenancy pleaded but yearly tenancy found—Suit dismissed for absence of notice—Subsequent suit after notice—Question of tenancy though raised held not finally decided within S. 11.**

Plaintiff sued defendant for ejectment and arrears of rent. Defendant pleaded that he was a permanent tenant and could not therefore be ejected. The Court found that the defendant was a tenant from year to year, but that a legal notice to quit had not been served upon him. It therefore decreed the claim for arrears of rent, but dismissed the claim for ejectment. Subsequently the plaintiff gave the defendant a notice to quit and sued to eject him:

*Held*: that although the issue as to the nature of the defendant's tenancy was directly and substantially in issue in the previous suit, it could not be said to have been finally decided in that suit and that therefore it was not res judicata. [P 83 C 1, 2]

**(b) Civil P. C. (5 of 1908), Ss. 11 and 100—Whether issue was raised and decided is question of fact.**

Per *Pratt, J.*—The question whether an issue was substantially raised and decided in a suit is a matter of fact to be decided upon the circumstances of each particular case. [P 82 C 2]

**(c) Civil P. C. (5 of 1908), S. 11—Finding not basis of decree does not operate as res judicata.**

Where a decree is not based upon a finding but is made in spite of it, the finding cannot operate as res judicata. [P 82 C 2]

**(d) Civil P. C. (5 of 1908), S. 11** — (Per *Heaton, J.*)—**"Finally decided" explained—Finding must have resulted in decree—When**

**decree is not only not based on finding, but is quite contrary to it, finding cannot be res judicata.**

Per *Heaton, J.*—The legislature did not intend the words "finally decided" in S. 11, Civil P. C., to apply to a finding not followed by anything peculiarly appropriate to itself. [P 83 C 2]

Where a finding is followed by a result which would equally follow from something essentially different, that finding cannot be regarded as a final decision. It is merely an expression of opinion and nothing more. [P 83 C 2]

*Coyajee* and *B. G. Rao*—for Appellant.

*H. V. Divatia*—for Respondent.

**Pratt, J.**—This appeal raises a point of res judicata. The plaintiff sued in 1903 alleging that the defendant was liable to pay assessment as enhanced by the Survey Settlement, but had failed to do so; that he was a tenant-at-will and not a permanent tenant; that plaintiff had given him notice to quit and that he had not given up possession. Plaintiff therefore prayed for two reliefs: (1) to recover possession of the land and (2) to recover arrears of assessment at the enhanced rate. Defendant in his written statement replied that he was not liable to pay enhanced assessment; that he was a permanent tenant; and that plaintiff was not entitled to recover possession.

The following issues were raised: (1) Whether it is proved that the defendant is a permanent tenant of the land in dispute or he is a tenant thereof at the pleasure of the plaintiff (i. e., as long as the plaintiff chooses to keep him as such)? (2) Has the plaintiff a right to take the land in dispute from the defendant (possession of the land in dispute)? (3) Is the assessment of the land in dispute enhanced on a re-survey thereof? and should the defendant be given a notice thereof under tho Land Revenue Code? and has such a notice been given to the defendant? If not, is not the defendant bound to pay the enhanced assessment under the Land Revenue Code? and (5) Has the plaintiff given to the defendant a notice requiring him to deliver up possession of the land in dispute and intimating to him that he is no longer willing to retain him as his tenant? The Court decided on the first issue that the defendant was a tenant from year to year, and not a permanent tenant; on issue 5 that a legal notice to quit had not been given; and therefore on issue 2 plaintiff was not entitled to recover possession; and on issue 3 the plaintiff was entitled to recover arrears of assessment at the enhanced rate. The suit for possession was therefore dismissed and a decree was made for arrears of assessment at the enhanced rate.

Plaintiff has now given notice to quit and files this suit for possession. He claims that the nature of defendant's tenure is res judicata. The question for decision is whether the defendant is bound by the finding in the first suit that he is not the permanent tenant. The solution of that question depends upon whether that issue was substantially in issue in the former suit and whether it was heard and finally decided. The question whether an issue was substantially raised and decided is a matter of fact to be decided upon the circumstances of each particular case: *Girdhar Manordas* v. *Dayabhai Kalabhai* (1). And although no rule of general application can be laid down this proposition is well established, that when a decree of the Court is not based upon a finding but was made in spite of it, that finding, cannot be res judicata: *Run Bahadur Singh* v. *Lucho Koer* (2), *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* (3), *Thakur Magundeo* v. *Thakur Mahadeo Singh* (4), *Ghela Ichharam* v. *Sankulchand Jetha* (5) and *Parbatty Debya* v. *Mathura Nath Banerjee* (6). The dismissal of the claim for possession therefore prevents the finding that defendant was not a permanent tenant from operating as res judicata.

But it is claimed that the decree for enhanced assessment is based on this finding and gives it the effect of res judicata. I think it clear however that the issue as to the character of the tenure was a matter collateral to the liability to pay enhanced assessment. The frame of issue 3 shows that the liability was attributed not to the tenure, but to the fact of the Survey Settlement. The finding is indeed consistent with the defendant being a permanent tenant, and therefore the decree for enhanced assessment was in no sense based upon the finding that defendant was not the permanent tenant.

Mr. Coyajee relied upon the two cases, *Peary Mohun Mukerjee* v. *Ambica Churn Bandopadhya* (7) and *Krishna Behari*

(1) [1884] 8 Bom. 174.
(2) [1885] 11 Cal. 301=12 I. A. 23 (P.C.).
(3) [1886] 13 Cal. 17.
(4) [1891] 18 Cal. 647.
(5) [1894] 18 Bom. 597.
(6) [1912] 40 Cal. 29=15 I. C. 453.
(7) [1897] 24 Cal. 900.

*Roy* v. *Bunwari Lall Roy* (8). In the first case the former suit was dismissed on the grounds of want of notice and of nonliability of defendants. In the second suit filed after notice the question of liability was held to be res judicata against the plaintiff. Here, after the decision of issue 1, issue 2 was not necessary for the disposal of the suit. But as both had been heard and determined against the plaintiff, he was held to be bound by both. The decision is in conflict with certain observations in the case of *Shib Charan Lal* v. *Raghu Nath* (9). But however that may be, it has no bearing on the present case. For the decree was based on both findings, whilst here it is made in spite of one finding and the other finding on which it is based was a collateral one. In *Krishna Behari Roy* v. *Bunwari Lall Roy* (8) an adopted son sued a patnidar for a declaration that the lease granted to him by his adoptive mother was in excess of her authority. The reversioner intervened disputing the validity of the adoption and the right of the plaintiff to sue. The first Court found that the adoption was valid but dismissed the suit as the patni lease could not be set aside. The reversioner appealed, and the Court of appeal affirmed the decision of the lower Court. The validity of the adoption was held by the Privy Council to be res judicata in a subsequent suit by the reversioner to set aside the adoption. Mr. Coyajee contends that the finding of the adoption was as much involved in the main purpose of the suit, the setting aside of the patni lease, as here the finding as to the nature of the tenancy is to the claim for enhanced assessment. The answer, I think, is that the reversioner intervened not to support the suit to set aside the patni, but to dispute the title of the adopted son. In his appeal he raised the issue of the adoption which was decided against him. As regards the reversioner the validity of the adoption was the substantial issue.

The two cases quoted by Mr. Coyajee do not therefore affect the conclusion I have come to on the authority of *Run Bahadur Singh* v. *Lucho Koer* (2) and the Indian cases that follow it in regard to issue 1, and in regard to issue 3 that the finding as to the nature of the tenancy was only collateral to the decree for enhanced assessment. The case of *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* (3) is a case on facts which are almost identical and the issue was there held not to be res judicata. I would therefore confirm the decree of the lower Court and dismiss this appeal with costs

**Heaton**, J.—I agree in the order proposed. I need not re-state the facts of the case. The law as to res judicata is contained in S. 11, Civil P. C. I always find myself in troubled waters when I am asked to deal with decided cases on this point, which do not proceed on the precise words of the section. To my understanding the section itself gives us a solution in this particular case. The issue as to the nature of the tenancy was I think undoubtedly directly and substantially in issue in the earlier case. For it was as to the nature of the tenancy that the parties were disputing and it was to get that dispute settled that they went to Court, though they also went about the amount of rent or assessment. But I do not think that it can be said that the issue as to tenancy was finally decided in the earlier suit. It is perfectly true it was decided, that is to say, the Court expressed a perfectly definite opinion about it. But the operative part of the decree was that the tenant should not be ejected though he had to pay a certain amount of rent. That is precisely the decree which would follow if the Court had held that the tenant was a permanent tenant and not a yearly tenant, though in fact it held that he was a yearly tenant. I cannot think that the legislature intended the words "finally decided" to apply to a finding not followed by anything peculiarly appropriate to itself. Where a finding is followed, as in this case, by a result which would equally follow from something essentially different, then I think it cannot be supposed that that finding is a final decision. It seems to me to be merely an expression of opinion and nothing more. Therefore I think that this appeal should be dismissed with costs.

G.P./R.K. *Appeal dismissed.*

(8) [1875-76] 1 Cal. 144=2 I. A. 283 (P.C.).
(9) [1895] 17 All. 174.

## A. I. R. 1919 Bombay 84

HEATON AND HAYWARD, JJ.

*Pandu Vithoji Ladke*—Defendant—Appellant.

v.

*Goma Ramji Marwadi* and *another*—Plaintiffs—Respondents.

Second Appeal No. 586 of 1917, Decided on 27th September 1918, from decision of Asst. Judge., Poona, in Appeal No. 97 of 1915.

**Hindu Law—Alienation—Coparcener can sell his share for valuable consideration—Joint possession cannot, however, be given to purchaser—Purchaser can only obtain declaration as to his interest in property.**

Under the Hindu Law, as recognized in the Bombay Presidency, a co-parcener can sell his own interest in joint family property, provided there is valuable consideration for the sale. Such a sale does not become void by reason of the fact that the deed incorrectly describes that which is sold as the entire property instead of describing it as such interest as the vendor possesses. [P 84 C 2]

In such a case, however, joint possession cannot be given to the purchaser. He can only obtain a declaration that he has acquired the interest of the vendor in the particular property and a direction that he be left to recover that interest by a separate suit for partition in which all necessary parties and properties should be joined. [P 85 C 2]

*K. H. Kelkar*—for Appellant.

*B. K. Mistry*—for Respondents.

**Heaton, J.**—The facts which it is necessary to set out for the purpose of our decision are these:

There is a joint Hindu family consisting, so far as the evidence in this case tells us, of one Vithoo, and his son Pandu. Vithoo, the father, purported to sell to the plaintiffs a portion of the joint family property possessed by himself and his son as co-parceners. It does not appear from the judgment in the suit what proportion the property sold was of the entire joint family property. But it was certain specified fields and we understand that there is other joint family property also. The plaintiffs say that they obtained possession of the field, which they thought they had bought and they were afterwards dispossessed. So they brought this suit against Pandu and another person to recover possession. Amongst the defendants they did not include Vithoo, the father and their vendor. It is found that, though the sale purported to be of the whole of these fields, it was not a sale for the benefit of the joint family. It cannot therefore operate as a sale of the entire property as it purported to be. As to that point there is in this case no doubt. But the question then arises as to whether the purchasers bought anything at all. The defendant Pandu says that they bought nothing. The plaintiffs say that at least they bought the vendor Vithoo's interest in the property sold. In certain parts of India the law of the Mitakshara, as it is there applied, is held to prohibit a sale of this kind. But here in Bombay, it is now a well established legal fact that a co-parcener can sell his own interest in joint family property, provided there is valuable consideration for the sale. This fact is recognized by the Privy Council as appears from the cases of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1) and *Balgobind Das* v. *Narain Lal* (2). We feel no doubt, therefore that the purchasers did get whatever the father Vithoo could sell in the way adopted, unless, and this point also was argued by the defendant appellant, seeing that the sale deed purported to sell the whole, it is void for that reason. In other words, it is argued that it is void, because it is a sale-deed of that which cannot be sold.

We think however that there is really no doubt that a co-parcener does sell his interest in the joint family property, even though the sale-deed takes the form not of a sale of his interest, but of a sale of the whole property which is described in the deed. There is clear authority for this in certain Madras cases: see *Vadivalam* v. *Natasam* (3) and *Marappa Goundan* v. *Rangasami Gaundan* (4). Our attention has not been called to any cases of this Court in which this particular point was dealt with. But we think that it would be unreasonable to hold that though a co-parcener can sell his own interest, such a sale becomes his by reason of the fact that the deed incorrectly describes that which is sold as the entire property instead of describing it as such interest as the vendor possessed. If objection can be taken to a sale of this kind, it lies with the purchaser and not with the seller to take objection. The purchaser might indeed object that he had been misled or that he has one thing palmed off on him whereas he paid for a

(1) [1880] 5 Cal. 148=6 I. A. 88. (P. C.).
(2) [1893] 15 All. 339=20 I. A. 116. (P.C.).
(3) [1912] 37 Mad. 435=16 I. C. 835.
(4) [1900] 23 Mad. 89.

very much better thing. Here however the purchaser does not take exception to the purchase, and it would be a curious deviation from one's ideas of justice to hold that an objection in this form could be taken not by but against him. We think therefore that the sale is good, even though the deed wrongly described what was sold. This is substantially the view taken by both the lower Courts and the view to which they give effect. But they give effect to it in a wrong form. The decree made by the first Court was, "plaintiffs granted joint possession of half of the plaint property, viz , Vithoo's share, along with defendant 1. Parties to bear their own costs under the circumstances", and that decree was confirmed by the Court of first appeal. In this particular, I think, the decrees were wrong. To me personally, it is an extraordinary thing that any stranger should ever be placed in joint possession of joint Hindu family property, sharing the possession with the co parceners in the joint family. If one stranger can be so put in possession then another can. You may have a Mahomedan, a Parsi or a European put into joint possession with the members of a Hindu famliy of their joint family property. So great an anomaly or, as I should say, absurdity as this is not supported by the highest authority. The matter was dealt with by the Privy Council in *Deendyal Lal* v. *Jugdeep Narain Singh* (5) and their decision was afterwards followed in *Hardi Narain Sahu* v. *Ruder Perkash Misser* (6). I think myself I cannot do better than follow the very words used in framing the decree of the Privy Council. The plaintiff obviously cannot obtain full possession of the property which is what he sues for, for he is not entitled to such possession. He ought not to be allowed to have joint possession, for that as I have explained is contrary to reason and authority. The most that he can get is a declaration. We make the declaration in this form:—The respondents, as purchasers at the sale by Vithoo, have acquired the share and interest of the said Vithoo in the property sold and are entitled to take such proceedings as they may be advised, to have that share and interest ascertained by partition. Claim to recover possession is dismissed. Both parties should bear their own costs throughout.

(5) [1877-78] 3 Cal. 198=4 I. A. 247. (P. C.).
(6) [1884] 10 Cal. 626=11 I. A. 26. (P. C.).

**Hayward, J.**—I agree. It is settled law that a co-parcener can sell his undivided share in a joint family in the Presidency of Bombay. If authority be required for that proposition, reference should be made to the decision of the Privy Council in *Balgobind Das* v. *Narain Lal* (2). It would also be inequitable to permit the vendor to deny that he had sold his own share merely because he purported in his sale-deed also to sell the share belonging to another co-parcener. It is again well established that joint possession cannot be given in such a case to the purchaser but merely a declaration that he has acquired the interest of the vendor, whatever that may be in the particular property, and a direction that he be left to recover that interest by separate suit for partition in which all necessary parties and properties should be joined. If authority for that proposition be required reference should be made to the case of *Hanmandas* v. *Valabhdas* (7) decided by Sir Stanley Batchelor.

G.P./R.K. *Suit dismissed.*

(7) [1918] 43 Bom. 17=46 I. C. 133.

## A. I. R. 1919 Bombay 85

SCOTT, C. J. AND SHAH, J.

*Mallappa Parappa Hospeti* — Defendant—Appellant.

v.

*Gangava Gangappa Hospeti* — Plaintiff—Respondent.

Second Appeal No. 106 of 1916, Decided on 17th July 1918, from decision of 1st Class, Sub-Judge, Belgaum, in Appeal No. 289 of 1914.

**Hindu Law — Adoption — Adoption by widow of her husband's father's cousin is not invalid but only opposed to Hindu sentiment.**

Under Hindu law the adoption to A (by his widow) of his father's cousin (father's brothers' son) is not invalid. Such an adoption is opposed to the Hindu sentiment but is not prohibited by Hindu law. [P 88 C 1]

*Jayakar* and *A. G. Desai*—for Appellant.

*Coyaji* and *P. B. Shingne* — for Respondent.

**Shah, J.**—The plaintiff in this case sued to recover possession of certain land as the next reversioner of the deceased Bhimappa. The defence was that Bhimappa's widow had adopted Gan-

gappa and that Gangappa had alienated the property to the other defendants. The plaintiffs claim must fail if the adoption is valid. Both the lower Courts have held the fact of the adoption proved but they have found it to be invalid according to Hindu law. Gangappa, the person adopted was before adoption the first cousin (father's brother's son) of Bhimappa's father. The lower Courts have held the adoption to be invalid on the ground that Gangappa was in the position of an uncle to the deceased Bhimappa and that his adoption is opposed to the theory upon which the law of adoption is based. The lower appellate Court has relied upon a passage in Steel's Law and Custom of Hindu Castes at p. 44 and certain observations in Mandlik's Hindu Law at p. 474. In the appeal before us it has been contended that though the adoption may be opposed to the sentiment of the Hindu community and to the theory of adoption, in the absence of any prohibition based upon any Smriti such an adoption ought not to be treated as invalid. Mr. Coyaji for the respondent has relied not only upon the passages referred to in the judgment of the lower appellate court but also upon the remarks in West and Buhler's Hindu law at p. 1038, the opinions of Nanda Pandita in Dattaka Mimansa, S. 5, Cl. 17, and S. 2, Cls. 29, 31, the observations of Golap Chandra Sarkar Sastri relating to incongruity of relationship in Tagore Lectures on the Hindu Law of Adoption in Ch. 8, (Edn. 2), and the necessity of the adopted son bearing the resemblance of a son according to the expression *putrachchhayavaham* in Saunaka's text referred to in the Vyavahara Mayukha and the Dattaka Mimansa.

The parties are Lingayats but I do not think that that circumstance makes any difference on the present question. The ground of invalidity, such as it is, is general and applicable to all those who are governed by Hindu law. It is not confined to the three regenerate classes. There is no special custom alleged in the present case and the validity of the adoption must be determined with reference to the ordinary Hindu law. The question that we have to consider is whether the adoption to *A* (by his widow) of his father's cousin (father's brother's son) is invalid. We are not concerned with the adoption of any nearer senior agnatic relation and I do not wish to be understood as expressing any opinion as to the validity of such an adoption. That must be considered if and when such an adoption takes place and the question as to the validity thereof is raised. There is apparently no reported case on the point which we have to decide and none has been cited to us in the course of the argument. There is nothing in the Mitakshara or the Vyavahara Mayukha expressly bearing on this point. I mean there is no express prohibition to adopt the father's first or distant cousin. As to the opinion expressed by Nanda Pandita in the Dattaka Mimansa, S. 5, Cl. 17, relating to the paternal uncle I am by no means clear that the word used there for paternal uncle, viz., *pitrivya* means anything more than father's brother (*pitribhrata*); but assuming that it includes an elderly relation in the position of the first cousin of the father it is clear that the opinions expressed by Nanda Pandita in Cls. 16 to 20 have been held in a series of decisions of this Court ending with *Gajanan* v. *Kashinath* (1) to be recommendatory and not mandatory except as to the three specific cases of daughter's son, sister's son, and mother's sister's son as regards the three regenerate classes. The opinions are based on the ground of virudha sambandha or the rules relating to niyoga. Having regard to the current of decisions of this Court, Mr. Coyaji has not pressed this part of the argument.

As regards Cl. 30 in S. 2 of the same book, it is clear that it can apply only to the father's brothers and not to the father's cousins. The text of Manu, upon which the opinions expressed in Cls. 30 to 33 are based, makes it clear that Nanda Pandita in Cl. 30 referred to the incapacity of an uncle (father's brother) and not of a person treated as being in the position of an uncle to be the object of adoption. He could not even mean father's half brother according to his interpretation of the word *ekajata* used in Manu's verse (9, 182). Thus Nanda Pandita's opinion expressed in that clause cannot help the respondent. Further with reference to one of Nanda Pandita's opinions based

(1) A. I. R. 1915 Bom. 99=39 Bom. 410=28 I. C. 978.

on his reading of the text of Manu, viz., that relating to the wife's brother's son in Cl. 33 it has been held that it is merely recommendatory and not obligatory: see *Bai Nani* v. *Chunilal* (2) and *Puttu Lal* v. *Parbati Kunwar* (3). Mr. Coyaji has however contended that in the expression putrachchhayavaham the prohibition to adopt the father's first or any distant cousin who would be in the position of an elderly relation to the adoptive father is necessarily involved quite independently of the considerations based on viruddha sambandha or niyoga. It is a significant fact however that no such prohibition is inferred in terms by the author of the Vyavahara Mayukha or even by Nanda Pandita anywhere apart from his inferences paras. 16 to 20, S. 5 of the Dattaka Mimansa. Having regard to the tendency of the decisions in this Presidency, it is not safe in my opinion to infer any such prohibition as a rule of law. Even in the case of the adoption of an only son, upon which opinions are clearly expressed by the authors of the Mitakshara, Vyavahara Mayukha and Dattaka Mimansa, these opinions are held to be merely recommendatory and not mandatory: see *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* (4) and *Vyas Chimanlal* v. *Vyas Ramchandra* (5).

There is no smiriti text laying down such a prohibition expressly and I am unwilling to infer such a prohibition from the expression putrachchhayavaham, firstly, because in the specific cases of daughter's son, sister's son and mother's sister's son, as regards the three regenerate classes the prohibition is accepted as it is referable to the Smiriti writers, Saunka and Sakala and not merely because it can be inferred from the expression according to the opinion of commentators and secondly, because the prohibition if generally inferred would apply so extensively and would be so important that Nilkantha and Nanda Pandita would have referred to it. From their omission to refer to this prohibition as inferable from the expression, I think that the expression suggests rather a rule of propriety at least as regards the first cousins and more distant senior relations than a positive prohibition. The adoption of such senior relations would be opposed to the sentiment of the Hindu community, and it may not be easy to dissociate the mandate from the recommendation. But on the whole I do not think that there is any legal prohibition to adopt the father's cousin.

I attach some importance to the consideration that the prohibition, if it is extended to a senior relation more distant than the father's brother, could not be properly restricted to the father's cousin, but would apply to any distant cousin of the father of the adoptive father. Mr. Coyaji contended—in fact he had to contend—that not only a first cousin but any distant cousin of the adoptive father's father or any elderly agnatic relation of the adoptive father would be ineligible for adoption as a matter of law. He conceded that the relations in the same degree as the adoptive father from the common ancestor would not be within the rule of ineligibility though Mr. Mandlik would consider them ineligible for adoption as not being junior in rank to the adoptive father. The adoption of a cousin has been held not to be invalid by the Madras High Court: see *Virayya* v. *Hanumanta* (6). I think that if the prohibition really exists and is so extensive, it would be supported by far clearer texts than we have, and that it would be in consonance with the general trend of the decisions on this branch of the law of adoption to hold that the expression putrachchhayavaham implies a recommendation and not a mandate, not to adopt the father's cousin and more distant senior relations.

As regards the observations of Steele, Mandlik, Sarkar and West and Buhler, I think they are valuable, so far as they are applicable, as indicating the sentiment but are insufficient for the purpose of establishing any rule of positive prohibition. In the passage in Steele's book, the reference to the paternal uncle may not be necessarily to the father's cousin; and apart from that it ocurs in a passage containing rules of preference, which are clearly recommendations and not positive rules of law. As to Mandlik's valuable criticism, it is noteworthy that the test

(2) [1898] 22 Bom. 973.
(3) A. I. R. 1915 P. C. 15=37 All. 359=29 I. C. 617=42 I. A. 155 (P. C.).
(4) [1899] 22 Mad. 398=26 I. A. 113=21 All. 460=7 Sar. 330 (P. C.).
(5) [1900] 24 Bom. 367 (F. B.).
(6) [1891] 14 Mad. 459.

of age has not been accepted in the Presidency as a definite rule of law : see *Gopal Balakrishna* v. *Vishnu Raghunath* (7); and the simple rule enunciated by him would apply to so many distant relations that it rather suggests a counsel of propriety than a rule of law prohibiting all such adoptions. West and Buhler refer in a foot-note at p. 1038 of their book to a passage in Steele's Law and Custom of Hindu Castes at p. 184, which shows that it is recommendatcry and not obligatory. As to Sarkar's observations based on the incongruity of relationship they stand on no better footing than Mr. Mandlik's criticism with reference to this point.

Assuming, without deciding, that the incongruity of relationship, apart from any consideration of viruddha sambandha or of the rules relating to niyoga, may afford a basis for invalidating an adoption, I do not think that it could be properly extended to the first cousin of the father of adoptive father or to the more distant elderly relations. I think that there is considerable force in the argument which has found favour with the lewer Courts that the adoption of a cousin of the adoptive father's father is opposed to the theory of adoption ; but on the best consideration that I can give to the point, I have come to the conclusion, not without reluctance, that though such an adoption is opposed to the Hindu sentiment, it is not prohibited by law and cannot be treated as invalid. The result therefore is that this appeal must be allowed and the plaintiff's suit dismissed with costs throughout on her.

**Scott, C. J.**—I concur.

G P./R.K. *Appeal allowed.*

(7) [1899] 23 Bom. 250.

## A. I. R. 1919 Bombay 88

SCOTT, C. J. AND SHAH, J.

*Dwarkadas Motilal* and *others*—Defendants—Appellants.

v.

*Bai Jekore*—Plaintiff—Respondent.

First Appeal No. 174 of 1916, Decided on 27th August 1918, from decision of Addl. First Class Sub-Judge, Ahmedabad, in Suit No. 1024 of 1913.

**Bombay Watan Act (5 of 1886), S. 2—S. 2 applies only to service inam—Grant for jivak badal i. e. free of service conditions—Daughter held entitled to her share.**

A dispute whether an hereditary office in the Panch Mahals was held on service tenure was settled by Government. In announcing the settlement the Government admitted that the grant had been made jivak badal, i. e. without the condition of service, and it was found that this announcement was made before the extension to the Panch Mahals of the Watan Amendment Act 5, of 1886. On the death of the last male holder his daughter filed the present suit for a declaration that she was entitled to a one-fourth share of her father's property. Her suit was decreed, and the defendants appealed to the High Court contending that the property in suit was all watan property:

*Held:* that the property in suit was not service inam to which alone the Watan Act applied and that therefore the plaintiff's suit had been rightly decreed. [P 92 C 1]

*Coyajee, Gokuldas K. Prekh* and *G. N. Thakor*—for Appellants.

*Jayakar* and *M. H. Mehta*—for Respondent.

**Judgment.**—This is a suit by the plaintiff to obtain a declaration of her right to one-fourth share in the property mentioned in the plaint which she alleges to be known as Vania Desai Vatan Property. It consists of two villages and part of two others, also pasaita lands and cash allowances. The plaintiff is the daughter of one Lallu Naranji who died in 1870 leaving a widow named Jadav who died on 8th January 1912. The plaintiff claims as a reversioner of Lallu Naranji. The family to which she belongs was entitled to inam lands and other property in the Panch Mahals. One branch of the family was entitled to property with which we are not concerned. The other branch descended from one Valji Raghavji who is represented by Sunderji Valji and Kuvarji Valji, each of whom had an eight annas share in the inam property of that branch. With Kuvarji's share we are not concerned. Sunderji's eight annas share descended in equal moieties to Kasanji and Mulji. We are not concerned with Kasanji's four annas share. Mulji had four sons: Raiji Jagubhai, Naranji and Bapuji. Bapuji married Deokuvar who represented the collateral branch of the inamdar family, and Bapuji and his children have since then enjoyed the income of the inams appertaining to that branch; and for the purpose of this suit it may be taken that Bapuji did not participate with his brothers in the enjoyment of the four annas share descended from Mulji Sunderji. Mulji's grandson Jadhay Raiji having committed murder, his one anna share was assigned by the Government of the time to his cousins Lalji Jagubhai and Naranji

Mulji. Thus Jagubhai and Naranji's families became entitled to Mulji's four annas in equal shares. The plaintiff claims not only a share of her father Lallu Naranji, but also a share of her father's cousin Nandlal Lalji, and thus makes up her claim to one-fourth of the inam property held by Valji's branch of the family. The chief defence is that the plaintiff being a female is excluded by the provisions of Act 5 of 1886 from participating in the inheritance, for the defendants contend that the property in suit is all watan property. The first important question therefore is as to the quality of the inam. Is it Jat inam or service inam; and secondly, if it be held not to be service inam, so that the plaintiff is not barred by the provisions of the Act of 1886, is she entitled to anything more than the two-annas share of her father Lallu Naranji ?

Although the inams are said to be 700 years old no sanad or original grant is forthcoming. It is said that there were original sanads but that they were destroyed in a fire in Godhra. Whether that allegation is true or false there are no copies of any alleged sanads forthcoming until the year 1888. In the year 1860 the Panch Mahals passed by treaty from the Maharaja Scindhia of Gwalior to the British Government; and Major Buckle representing the British Government was charged with the duty of investigating the nature of the various holdings in the territory so ceded. The result of his investigation was embodied in a report to Government in which he reported that the four villages in which the plaintiff claims to be entitled to share were held on service tenure. Government acted upon this report for a considerable time. In 1872 they made rules for the settlement of alienated lands and cash allowances in the Panch Mahals: the following portions of the rules are relevant:

"2. All lands held by individuals as personal inams, without the condition of service, the estimated value of which has been allowed for in the exchange of territory with His Highness Scindhia shall be continued hereditarily to lineal male heirs in male descent of persons who were in possession at the time of the cession of the Panch Mahals or of those whose names are found entered in the accounts or in any authentic documents of His Highness Scindhia or in perpetuity as heritable and transferable property on the payment of two annas quit rent levied in Gujarat under Act 7 of 1863.

5. All lands not fulfilling the conditions laid down in Rr. 1 to 4 but claims to which may have been registered under the notification of 22nd December 1865, may, unless the claim appear to the settling officer to be so entirely unfounded as to warrant resumption (in which case an appeal will lie as hereinafter provided), be continued subject to the payment of a quit rent of from one-fourth to one-half of the survey assessment in perpetuity as endowment property in the case of those held in trust for religious or charitable institutions and as heritable and transferable property in the case of those held as personal inams. Provided that lands claimed by hereditary district and village officers on any other than service tenure shall be considered as held on that tenure unless they are proved to be held on some other tenure to the satisfaction of the settling officer. N. B. The case of lands held by hereditary district officers shall be disposed of separately. N. B Allowances to hereditary district officers will be disposed of separately."

The family to which the parties to this suit belong were known as Vania Desais, the term Desai implying a hereditary servant of the pargana or district. The family were offered in settlement under the rules the option of paying four annas in the rupee of assessment in lieu of service, that is Government offered "to relieve them of all liability to perform service and to resume ¼th of their service allowances, land and cash, leaving them the remaining 3/4 ths as private property." The Desais declined this offer, and on 9th May 1879 Government by a resolution declared that service had been exacted from the Desais in the past, and that Government required them to perform in the future all the work of the katcheri. This resolution evoked a petition from the Nagar and Bania Desais of Godhra on 21st July 1879 in which they complained that the four-annas settlement which had been offered to them was too heavy, that their inams were not held for service, and the only work that their ancestors had done in the past was occasionally to advise the Scindhia's Government, on which advice they received presents. In reply to this petition Government by a

resolution of 14th November 1881 called upon the Desais either to accept or definitely to decline the four-annas settlement. On 23rd January 1882 the Nagar and Bania Desais again presented a petition to Government and contended that their inam was jat or personal inam, granted for maintenance (jivak badal) and not held for service.

As a result of this petition Government entirely altered its attitude towards the Desais. In a resolution, dated 8th May 1884, it was announced that the Government having reviewed the whole of the correspondence on the subject of the vatan emoluments of the Desais of Godhra was inclined to reconsider the offer of a nonservice settlement previously made to them. Government understood that what the Desais asked for was a two-anna settlement of the nine village (five being Nagar and four Bania Desai villages) which were granted to them jivak badal to be calculated and paid at once on the full assessment of the villages and that they assented to a four annas settlement of their miscellaneous lands and cash allowances. Government observed that the title asserted to the nine villages hardly brought them under the class of hereditary inam, but on the other hand doubts entertained as to the nature of the title might perhaps be admitted to be such as the summary settlement was intended to remove. The commissioner was directed to report after consultation with the Collector the detailed arrangements of settlement on the terms which Government was willing to entertain.

On 18th January 1888 a sanad was issued by Government to the Bania Desais in respect of the village of Sureli, which recited that the village had been found to be held as personal inam without the condition of service, and that the holder of the village had with a view to its being continued as private property agreed to pay to Government a fixed quit rent at two annas in the rupee, and it was thereby declared that the village should be continued for ever by the British Government as the private property of the person who should from time to time be its lawful holder on the conditions specified therein. On 17th March 1888 a Sanad was issued to the Bania Desais in respect of the village of Vinzol purporting to be in accordance with the rules of 1872, reciting that the village had been found to be held as personal inam without the condition of service.

It was in other respects identical, mutatis mutandis, in terms with the surely sanad. Sanads are not forthcoming for the lands held by the Bania Desais in Padardi and Kasanpur. Why such sanads have not been produced has not been explained, but that there was a sanad for Padardi granted a little before the Sureli sanad appears from the Alienation Register for 1887-88 kept under the provisions of the rules under S. 214, Land Revenue Code. From that register (Col. 11) it appears that the inam lands in the villages of Padardi, Sureli and Vinzol were "permanently enfranchised as private property." Under this comprehensive description the period of enjoyment which has to be entered in Col. 11 is stated. It is true, as pointed out by the appellants' counsel, that Col. 4 which is reserved for a description of the alienation has an entry of "watan inams" against Padardi, but whatever may be the ground upon which this entry was made, it cannot affect the question now under consideration, for Col. 4 seems to us to be concerned with the origin of the cession and not with the term and nature of the present enjoyment for the statement of which Col. 11 is provided. In the catalogue of inams for 1884-85, Sureli was entered in the category of the servants of the pargana. In the same catalogue Vinzol in 1886-87 was entered under servants of the pargana and in the following year as watan inam. Padardi for the years 1884-85, 1885-86, 1886-87 was entered under servants of the pargana and in 1888-89 as permanent watan inam. These entries may have been in supposed compliance with the proviso to R. 5 of 1872. The pasaita lands are also specified in the Alienation Register under the villages to which they appertain and in each case Col. 11 describes them as "permanently enfranchised as private property."

The village of Kasanpur is not mentioned in the petition of the Desais to Government, but forms part of the plaintiff's claim in this suit. On the other hand the villages of Narsana and Dhandalpur are mentioned in the petition as belonging to the Bania Desais, but they are not included in this suit. Those villages belonged to Kalianji's branch of the family, and therefore Nandlal Lalji was

not interested in them. That is the explanation of their not being included in the suit. Kasanpur was a village in which a four annas share belonged to the family for many years, and in 1885-86 a further three annas were purchased by the Bania Desais. The village appears to stand on the same footing as regards the quality of its tenure as the other villages in question in the suit. For it is mentioned in the Alienation Register as "permanently enfranchised as private property" in the same way as the villages of Padardi, Sureli and Vinzol are mentioned, and the same register mentions in the column relating to sanads the date of the sanad issued in respect of Kasanpur, which indicates that the settlement of the tenure must have been come to at the same time as the settlement relating to the other villages.

The cash allowances undoubtedly fall under the category of desaigiri haks or cash allowances granted to persons holding the title of Desai. It is not surprising that whatever the settlement arrived at in 1888, they should be described as "emoluments of a watan" in the sanad of 6th April 1888 (Ex. 245), which recites that the holders of the watan thereinafter set forth and held on service tenure had agreed to the annual deduction of four annas in the rupee on the cash emoluments on condition of enjoying the remainder free from the obligation of service and the enjoyment of such remainder being guaranteed to them by sanad. The sanad then declares:

"The emoluments of this watan shall, as now confirmed, be continued by the British Goverment in perpetuity without demand of service or any further deduction therefrom on that account and without any objection or question on the part of Government as to title, whether it shall have accrued in virtue of inheritance, adoption, transfer or otherwise."

In the Register of Nemnuks or allowances, the holders of the allowances in question are described as watandars of the province and the nature of their property "private property for ever subject to four annas in the rupee."

The manner in which the settlement recorded in the Government Resolution of 1884 was worked out has now been stated. It was a settlement in perpetuity giving to the holders full and complete rights of ownership free from service and subject only to the reserved quit rent or deduction. In terms and in substance it conferred upon the Desais the whole of the inam property, subject as aforesaid, as their private property for ever with all incidents of inheritance and alienation attaching to other private property. The Government Resolution of 1884 was before but the sanads were granted after, the passing of the Panch Mahals Laws Act (Act 7 of 1885) and the Watan Act Amendment Act 5 of 1886.

There can be no doubt that whatever construction may be placed upon certain provisions of the Watan Act relied upon by the defendants, the Crown Lands Act of 1895 compels us to construe the sanads of the Sureli and Vinzol lands according to their tenor as confirming the villages as the private property of the holders subject to payment of quit-rent; and where this is the conclusion forced upon us by the only sanads of the lands in suit which have been produced, it is difficult to come to a different conclusion as to the nature of the settlement in so far as it relates to the other villages referred to in the Government Resolution of 1884 which records the fact of the settlement. We have in this case to decide a dispute between the plaintiff and the defendants claiming as reversioners of Nandlal and Lallu a beneficial interest in the inams and haks. Government is not a party, and nothing we now say will affect any contentions which may hereafter be raised on behalf of Government. Without prejudice to any contention on the part of Government, we are unable to come to any other conclusion with regard to Kasanpur and the pasaita lands and the cash allowances which were confirmed in perpetuity subject to quit rent or deduction of four annas in the rupee according to the same settlement of 1885. At that settlement the Government contention was abandoned that the Desais held their villages otherwise than for their maintenance without obligation of service, and having regard to the Desais' contention in their petitions of 1879 and 1882, the same result must have been arrived at with regard to the pasaita lands and cash allowances regarding which the quantum of quit rent or deduction was not in controversy.

The defendants take up an attitude directly opposed to that of their predecessors, the petitioning Desais, at a time when they successfully contended that

their inam lands and haks were not held for service but were their private property. In order to defeat the plaintiff the defendants rely upon the terms of the Watan Act as interpreted in *Bai Jadhaw* v. *Narsilal* (1), contending that that decision shows that the property in suit is and always has been held for service and must be so held for the future and that for that reason the plaintiff as a female is debarred from inheritance by Act 5 of 1886. That decision however must not be applied to a state of facts different from those which were before the Court. The actual point decided is correctly stated in the first clause of the head note: "A watan in Guzerat does not cease to be watan property as defined by S. 4, Bombay Act 3 of 1874, merely because a service commutation settlement has been effected. Such a settlement does not change the nature of the property simply because service is not demanded." In 1868 the services attached to a watan were dispensed with and a sanad was issued in the following terms: "The watan as now confirmed shall be continued without demand of service or any objection or question on the part of Government as to title to whomsoever shall from time to time be the lawful holder thereof but without affecting the rights and interests of other parties." There was no dispute as to existence of an hereditary office for which services had been exacted and the watan was confirmed and continued.

The facts here are entirely different. The existence at any time of an hereditary office held on service tenure was disputed and the Government by the resolution announcing the settlement admitted that the grants of the villages had been made jivak badal, which was the contention of the Desais as to all the lands and the cash allowances. The settlement was in fact arrived at before the extension to the Panch Mahals of the provisions of the Watan Act, but such settlements were confirmed by Cl. 2, S. 15 of that Act, assuming that the Watan Act would apply. We hold therefore on the first question that the property in suit was not service inam to which the Watan Act applies.

G.P./R.K. *Appeal partly allowed.*

[*Note*—The rest of the judgment is not material to this report—*Ed.*]

(1) [1901] 25 Bom. 470.

## A. I. R. 1919 Bombay 92

SCOTT, C. J. AND HAYWARD, J.

*Ramchandra Swaminaik Jorapur*—Appellant.

v.

*Manubai Ramdas Gujar*—Respondent.

Second Appeal No. 250 of 1917, Decided on 8th April 1919, against decision of Dist. Judge, Bijapur, in Appeal No. 60 of 1915.

**Hindu Law—Adoption—Natural family—Son given in adoption cannot execute decree obtained by his natural father.**

A son given in adoption cannot, for any purpose, be regarded as having existed so as to acquire a vested interest in the property of his natural father. Where therefore the natural father obtains a decree and dies before its execution, such son must be treated as non-existent for the purpose of executing the decree.

[P 93 C 1]

*Nilkanth Atmaram*—for Appellant.

*G. S. Mulgaonkar*—for Respondent.

**Judgment.**—This is an application in execution which gives rise to a rather original position. It was presented by the decree-holder in a suit in which it had been decreed that the applicant might open a new door in the southern wall of his house. The person against whom the decree was passed opposes the application on the ground that the applicant, having been given in adoption since the date of the decree, has no right to take out execution. The decree presumably was in respect of his natural father's house and for the benefit of that house. It was passed in 1908. The decree-holder was subsequently adopted, and after his adoption sought to execute the decree. It is contended that he by his adoption had lost his rights in his natural family, and the only person entitled to execute the decree was the person entitled to the house, and that person must be the heir of Narsidas, the natural father of the applicant. Now the applicant was adopted by his natural father's first cousin Bhagwandas. Therefore his relation to his natural father was no higher than that of Bhagwandas. Narsidas however had left a daughter who has a son, and the daughter's son is to be preferred to a first cousin in Western India. The only ground on which the applicant after his adoption could be entitled to execute the decree in respect of property inherited from his natural father would be on the theory that he lived in his natural family until his adoption and then died,

having acquired a vested interest descendible to his heir.

The daughter's son of Narsidas would then be the sister's son of the applicant, and the son of Bhagwandas, i. e., the applicant himself, would be a preferential heir. Any such fiction however appears to be untenable having regard to the definite pronouncement of the Privy Council in *Nagindas Bhugwandas* v. *Bachoo Hurkissondas* (1). At the close of the judgment is cited a passage from a judgment of Mitter, J., in which it is stated that the theory of adoption involves the principle of a complete severance of the child adopted from the family in which he is born, both in respect of the paternal and the maternal line, and his complete substitution into the adopter's family as if he were born in it. Then the Privy Council observes that with that statement as to the Hindu law of adoption their Lordships agree. The result is that the fiction goes the length of treating the adopted son as having been from his birth in the family of his adoptive father, and therefore he cannot for any purpose be regarded as having existed so as to acquire a vested interest in the property of his natural father. The consequence is that he must be treated as non-existent for the purpose of the execution of the decree, and the nearest heir of Narsidas will be the daughter's son. For these reasons the objection to the application appears to be a good one. We must set aside the decree of the District Court and dismiss the darkhast. As it is a very novel and technical point, we think that each party should bear his own costs.

G.P./R.K. *Decree set aside.*

(1) A. I. R. 1915 P. C. 41=40 Bom. 270=43 I. A. 56=32 I. C. 403 (P.C.).

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## A. I. R. 1919 Bombay 93

HEATON AND SHAH, JJ.

*Dinbai Jijibhoy Khambata* In re

Criminal Revn. Appln. No. 51 of 1919, Decided on 7th April 1919, against order of Resident Magistrate, First Class, Bandra.

**Bombay District Municipalities Act (3 of 1901), S. 161 — Term "such Magistrate" in sub-S. 2 refers to inferior criminal Court— His orders can be revised by High Court— Criminal P. C. (5 of 1898), S. 439.**

**The Magistrate referred to as "such Magistrate" in the latter part of sub-S. (2), S. 161, Bombay District Municipalities Act, is an inferior criminal Court, and his orders are liable to revision by the High Court.** [P 93 C 2]

*Coyajee*—for Applicant.

*S. S. Patkar*—for the Crown.

**Shah, J.**—In this case the Notified Area Committee for Andheri gave notice to the owner of a certain house to construct certain drainage work specified in the notice under the rules framed by the Governor in Council under the Bombay District Municipalities Act. It is said that the owner failed to carry out the work, and that it was completed by the Notified Area Committee. An application to the Resident Magistrate of Bandra was made under S. 161 (2), Bombay District Municipalities Act, for the recovery of the expenses incurred by the Committee as provided by R. 62, Cl. (6), of the rules applicable to the Committee. The owner of the house pleaded in effect that the Chairman of the Committee had substantially modified the terms of the notice, and that the work as suggested by him having been carried out, she was not liable for the expenses incurred by the Committee. The Magistrate directed the expenses to be recovered by distress. It is this order for distress that is now sought to be revised.

The first question is whether this order is liable to revision by this Court. I think it is. The first part of sub-S. (2), S. 161 relates to prosecutions to be instituted before any Magistrate, and it is unquestionable that the power which the Magistrate exercises in respect of any prosecution is a judicial power and any order made by him would be the order of an inferior criminal Court liable to revision by this Court. The power, which he has to exercise under the latter part of the subsection, is ordinarily of a ministerial nature. But this part of the subsection refers to such Magistrate as has been referred to in the first of the subsection; and I do not see any good reason to hold that "such Magistrate" is not an inferior criminal Court, and that his orders are not liable to revision. It may be that having regard to the nature of the enquiry that a Magistrate has to make, when an application is made to him for the recovery of fines or penalties or sums for compensation or for expenses, there would not be any scope for revising his orders ordinarily. For instance where the fine or penalty or compensa-

tion is otherwise duly determined, he would not be concerned with the question of determining the amount. But there may be occasions when he may have to determine the amount of compensation or expenses, where it is disputed, and the scope of the enquiry will necessarily depend upon the nature of the defence put forward by the owner on an application under the latter part of sub-S. (2). But it is clear that the Magistrate will have to make some enquiry in proper cases; and I see no reason to treat such an enquiry as purely ministerial, when the enquiry contemplated by the Magistrate in the formal part of the same subsection is purely judicial. This view is in consonance with the decision of this Court under S. 84 of the old District Municipal Act (Bombay Act 6 of 1873), which corresponded in part to the present sub-S. (2), S. 161: see *Municipality of Ahmedabad* v. *Jumma Punja* (1) and *Queen-Empress* v. *Nathu* (2). No doubt the wording of that section was different. But I do not think that the legislature meant to effect any change in this respect; and I gather that meaning from the circumstance that both these powers are referred to in one subsection, and that one of them is purely judicial. Unless the contrary meaning is clearly indicated, I think that it is reasonable to hold that no differential treatment is intended in respect of orders made by Magistrates under sub-S. (2). The decision in *In re Dalsukhram Hurgovandas* (3) relating to S. 86, Bombay District Municipalities Act, is an instance in point and is in no way inconsistent with the construction which I put upon sub-S. (2), S. 161.

The next question is whether there is any ground to revise the order. If it were clear that the learned Magistrate made his order after making proper enquiry as to the merits of the contention put forward by the owner of the house, I would not interfere. But it is alleged in the petition that the order was made without making any enquiry as to the merits of the contention raised by the owner, and as it is not denied before us, I think under the circumstances it would be proper to direct the Magistrate to make a proper enquiry and to determine whether the notice of the Notified Area Committee was in fact modified by the Chairman as alleged by the petitioner and whether he was competent to so modify it according to the rules. The learned Magistrate purports to find that the notice was neither modified nor cancelled. But it is not clear that it was the result of a proper enquiry on the merits. I would make the Rule absolute, set aside the order for distress, and direct the Magistrate to dispose of the application for the recovery of expenses according to law.

**Heaton**, J.—I agree to the proposed order. We have to find out the meaning of Cl. (2), S. 161, Bombay Disarict Municipalities Act and it is a difficult task. If the words "and also all claims . . . in this Act" were omitted, there would not be any great difficulty. The section would then provide for the trial of certian matters by a Magistrate and for the method of enforcing the fines and penalties inflicted by the Magistrate. The former would be a judicial, the latter a ministerial, act, the former could be revised by this Court, and, as I think, not the latter. The introduction of the words "and also all claims, etc.," makes the real difficulty. The section in general however provides for (1) the arriving at a judicial decision ; and (2) the carrying out ministerially of that decision. Taking the general meaning, you cannot have the second without having the first. That meaning must also, I think, apply to the case of "claims to compensation or other expenses," unless some cogent reason to the contrary is forthcoming, and I cannot find such reason. That being so, it follows that there must be a decision on the claim before the amount can be recovered and that decision must be a judicial decision. This may or may not be what was intended when the section was enacted. I decide that it is what was intended. If it is not, the legislature should make the matter clear.

G.P./R.K. *Rule made absolute.*

(1) [1893] 17 Bom. 731.
(2) [1891] Rat. Unrep. Cr. C. 559.
(3) [1907] 9 Bom. L. R. 1347.

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**A. I. R. 1919 Bombay 94**

SCOTT, C. J. AND HAYWARD, J.

*Kurvarbai* and *others* —Appellants.

v-

*Jamsedji Rustamji Daruvala* and *others*—Respondents.

Second Appeal No. 1108 of 1916, Decided on 15th January 1919.

**(a) Easements Act (1882), S. 15— "Peaceable enjoyment" explained.**

Peaceable enjoyment within the meaning of S. 15 means enjoyment without interruption or opposition of the servient owner sufficient to defeat the enjoyment. [P 95 C 2]

**(b) Easements Act (1882), S. 15— Obstruction—Something must be done on servient tenement itself.**

Obstruction or opposition to the enjoyment of a right of easement must find expression in something done on the servient tenement itself. [P 95 C 2 P 96 C 1]

**(c) Easements Act (1882), S. 15—Mere protest does not amount to interruption.**

Mere protest on the part of the servient owner does not amount to interruption. [P 96 C 1]

*H. V. Divatia*—for Appellants.

*G. N. Thakore*—for Respondents.

**Scott, C. J.**—This suit was filed by the plaintiffs for a mandatory injunction directing the defendants to remove the screen erected by them against certain Jalis and windows in the western wall of the plaintiff's house and to the west of the terrace on the second storey, and for a permanent injunction restraining them from obstructing the passage of light and air to the jalis, windows and terrace in future. The lower Courts have held that the plaintiffs are entitled to a mandatory injunction for removing the screen except as to the terrace, and that they are not entitled to a permanent injunction restraining the defendants from obstructing the passage of light and air to the jalis and windows. The appeal has been preferred by the defendants against the mandatory injunction, and cross-objections have been preferred by the plaintiffs on the ground that a permanent injunction should have been granted. The claim for permanent injunction has not been pressed, and is clearly untenable in the circumstances as they exist at at present.

The only question remaining therefore is whether the defendants should succeed in their appeal with regard to the mandatory injunction. The screen was erected more than 20 years after the jalis and windows came into existence and the access of light and air through the jalis and windows has been uninterrupted, so far as physical interruption goes, for upwards of 20 years. The easement therefore claimed by the plaintiff has prima facie been acquired. But it is argued that the access and use of light and air have not been "peaceably enjoyed" according to the meaning of those words in S. 15, Easements Act. It is contended that the enjoyment has not been peaceable as in 1895 and again in 1911 notices were given objecting to the maintenance of the windows and jalis. It is contended by the learned pleader that according to the English authorities, it cannot be said that there has been peaceable enjoyment if there has been protest and a passage from the judgment of Brown, J. in advising the House of Lords in *Dalton* v. *Angus* (1) was referred to in which the learned Judge threw out some suggestions as to the weight to be attributed to protest while an easement is in the course of acquisition. In the ruling judgments which are to be found recorded in that case, Brown, L. J.'s is the only judgment which suggests that protests can have any effect and Lindley, J. in advising the House said that he could find no trace of any authority in support of the provision that a protest would be effective to prevent the acquisition of an easement. No support for the provision contended for is to be found in the judgments of their Lordships of the House of Lords in that case.

Then *Sturges* v. *Bridman* (2) was referred to in which it was said that the enjoyment would not be peaceable if a servient owner contested and endeavoured to interrupt the enjoyment. It is not merely contesting but it is contesting combined with endeavours to interrupt which the Court thought might interfere with the acquisition of an easement. In *Eaton* v. *Swansea Waterworks Company* (3) it was held that a conviction before a Magistrate not appealed against might be an acknowledgment that the occupation was not as of right It is to be observed however that the Easements Act, S. 15, where it deals with the easement of light and air for a building, does not make eujoyment as of right one of the conditions for the successful acquisition of such an easement. The learned pleader for the respondent has referred the Court to the Tagore Law Lectures delivered by Mr. Peacock (pp. 360 and 361), who deduces from the cases that "peaceable enjoyment" means "enjoyment without interruption or opposition of the servient owner sufficient to defeat the enjoyment," and again "that obstruction or opposition to enjoymeut must find expression in

(1) [1881] 6 A. C. 740.
(2) [1879] 11 Ch. D. 852.
(3) [1851] 17 Q. B. 267

something done on the servient tenement or the legal proceedings." The reference to legal proceedings is no doubt a reference to the judgment in *Eaton* v. *Swansea Waterworks Company* (2), to which I have already attended. It does not appear to me that the true effect of the authorities can be put more concisely or accurately than in the statement in Peacock's Lectures. I therefore find that there has not been any interruption of the peaceable enjoyment of the easement claimed during the 20 years necessary for its acquisition.

Then it is argued that upon the findings of the Court as to the effects of the interference a mandatory injunction ought not to have been granted. But the Court finds that the defendants have completely locked up the jalis and windows in the western wall which are the only apertures in that wall by erecting the screen close to the wall and have completely cut off plaintiffs from access of air from the west and as to the jalis on the first floor the light and air in the rooms are insufficient, and that is admitted by one of the defendants. Whether or not plaintiffs could get on without access of light and air through the jalis and windows in the second and third storeys is a question which we have not got to decide but the defendants clearly cannot maintain their obstruction against the jalis and windows in the first floor. They must therefore take down the whole screen. For these reasons it appears to me that the judgment appealed from was right and this appeal should be dismissed with costs. The cross-objections are also dismissed with costs.

**Hayward, J.**—I concur.

G.P./R.K. *Appeal dismissed.*

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## A. I. R. 1919 Bombay 96

HEATON AND SHAH, JJ.

*Ramkrishna Haribhaoo Vadke*—Accused—Applicant.

v.

*Emperor*—Opposite Party.

Criminal Revn. Appln. No. 1 of 1919, Decided on 26th March 1919, from order of Resident Magistrate, 1st Class, Bandra.

**Workman's Breach of Contract Act (13 of 1859), S. 1—Act does not apply to contract of service for years, advance being repayable out of wages to be earned.**

The Workman's Breach of Contract Act relates to contracts in which workmen have received advances of money on account of the work which they have contracted to perform, and has no application to a contract of service for a term of years accompanied with an advance of money which may be paid off from the wages the workman is to earn; as such a contract is not one made on account of the work which he has contracted to perform.

[P 50 C 1]

*M. M. Kotasthane*—for Applicant,

*Koyajee* and *V. C. Kelkar*— for the Crown.

**Heaton, J.**—The main purpose of the contract is that the artificer shall work for ten years for his employer. One of its stated objects, and a most important one, is to prevent the artificer leaving his employer's service during the period of ten years. I cannot believe that such contracts as this were ever intended to come under Act 13 of 1859. To me the words taken with the declared object of the Act definitely suggest that they were not. Therefore I think the Rule should be made absolute.

**Shah, J.**—The question arising in this application is whether the contract between the parties falls within the perview of Act 13 of 1859. The applicant entered into a contract with his employer on 17th January 1917, whereby he agreed to serve for a period of ten years on a salary of Rs. 40 per mensem as an artisan and not to go elsewhere leaving his service. The employer purported to advance Rs. 286; but it is found that Rs. 186 represented the previous advances and that Rs. 100 only were advanced in cash at the date of the contract. The advance is described as having been made in cash for the work to be done under the contract. The applicant agreed to repay this sum of Rs. 286 by deducting Rs. 5 out of his salary every month. He agreed to pay off the advance in ten years. The contract contemplates further advances, and also provides that if any part of the sum advanced, or to be advanced, remains unpaid at the expiry of the ten years he will serve on the same terms till the whole amount is paid off.

Taking the terms of the contract as a whole, it seems to me that the principal item is the undertaking on the part of the applicant to serve on a salary of Rs. 40 per mensem for ten years and that the advance is really a subordinate thing intended to secure as far as possible a due fulfilment of the contract of service.

The sum of Rs. 186 advanced from time to time prior to the contract cannot be treated as an advance of money on account of the work to be performed under the contract. The remaining sum of Rs. 100 advanced in cash has no doubt some relation to the work under the contract. But in effect it is nothing more than a loan, which the workman is bound to pay in any event, and which the contract provides may be paid off at the rate of Rs. 5 per month. The Act of 1899 relates to contracts in which workmen have received advances of money on account of the work which they have contracted to perform. I do not think that the advance in the present case fulfils that condition. I think that the present contract is in the main a contract of service for ten years, accompanied with an advance of money which may be paid off from the wages which the workman is to earn under the contract, but which cannot be said to have been made on account of the work which he has contracted to perform. In my opinion the Act does not apply to such a contract. I therefore agree that the Rule should be made absolute and the order of the lower Court set aside.

G.P./R.K. *Rule made absolute.*

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## A. I. R. 1919 Bombay 97

HEATON AND HAYWARD, JJ.

*Gulam Mahomed Azam*—Accused—Applicant.

v.

*Emperor*—Opposite Party.

Criminal Revn. Appln. No. 248 of 1918, Decided on 1st October 1918, to revise conviction and sentence passed by Chief Presidency Magistrate, Bombay.

**(a) Transfer of Property Act (4 of 1882), S. 108—Position of tenant holding over is recognized by law—Specific Relief Act (1877), S. 9.**

A tenant holding over has a position recognized by the law and has a right to retain possession of the premises he occupies even against the landlord himself until dispossessed in due course of law. [P 98 C 1]

**(b) Penal Code (45 of 1860), S. 339—Landlord blocking passage of tenant holding over is guilty of offence of wrongful restraint.**

Where a landlord blocked up the entrance to a tenant's rooms who was holding over and thus prevented him from entering the rooms:

*Held*: that the landlord was guilty of wrongful restraint. [P 98 C 1]

*Strangman* and *Velinkar*—for Applicant.

*Setalvad* and *N. K. Mehta* for *G. N. Thakor*—for Complainant.

*S.S. Patkar*, *Govt. Pleader* and *E. F. Nicholson*, *Public Prosecutor*—for the Crown.

**Heaton, J.**—The accused, a landlord, has been found guilty of abetting the offence of wrongful restraint in that he caused the door of complainant's room, which opened outward, to be blocked up. By so doing he prevented complainant from entering his room by the ordinary door, that is he prevented him from going in a direction in which it is said he had a right to go. If the facts and if the rights of the complainant are as stated and implied in this brief statement, then the conviction is correct.

The case is not one of the kind that usually invites our consideration in revision. The Magistrate was quite competent to ascertain the facts and to make the required inferences from them. I do not propose therefore to say more on that aspect of the case. But owing to the circumstances that the accused is a Bombay landlord and the complainant had been one of his tenants and still remained in occupation of one of the rooms in the landlord's premises the discussion has touched points of some general importance. As these points are relevant to the case something ought to be said about them. By 1st March at latest the complainant had ceased to be a real tenant of the accused and though he remained in occupation of the room he had formerly rented, the complainant did so against the wish of the landlord. He was what is termed a tenant holding over. He was this peculiar product of the law of landlord and tenant on 1st May when he found himself barred from entering his room by the usual way. Had he a right to enter the room by that way? If he had, the conviction of the accused is correct; if he had not, that conviction is bad. This therefore is the question to be solved. Had the case arisen in England, the answer would apparently be that the tenant had not a right to enter the room. That seems to me to follow from the case of *Jones* v. *Foley* (1). The law in this country is however different. It is true that the landlord was entitled to possession of the

(1) [1891] 1 Q. B. 730.

room; that the complainant was not strictly entitled to it; and that in occupying the room he was not acting as of right, was indeed defying the legal rights of the landlord. How then can the complainant be said to have a right to enter the room when fundamentally, as between landlord and tenant he had not such a right? Is it not equivalent to saying that he has a right to do wrong? This view of the case would have prevailed with me were it not for the curious, and it may be highly beneficial embellishment of the relations of landlord and tenant introduced by S. 9, Specific Relief Act. Under that provision of the law a tenant holding over, who is dispossessed by anyone other than his landlord, can bring a summary suit and be restored to possession. That is natural enough, for whatever his immediate position the tenant acquired possession legally and should not be dispossessed with impunity by one who has no right whatever to possession. But by the case of *Rudrappa* v. *Narasingrao* (2) the very simple position above described has been imposed upon the landlord and tenant themselves, when the former dispossesses his tenant holding over, otherwise than in due course of law. This shows that the tenant holding over has a position recognized by the law and that he has a right to retain possession of the premises he occupies even against the landlord himself, until dispossessed in course of law. That being so the complainant, undoubtedly, had a right to enter the room.

It was urged that in the Town and Island of Bombay the English law is in force unless modified by Acts of the Indian Legislature. Assuming this to be so yet the English law is in this matter modified or rather superseded by the Transfer of Property Act, S. 9, Specific Relief Act and other enactments. The modern law is not, as I think the English law modified merely in the sense that a single exception is grafted on to it. An Indian law is enacted and is so complete that for the basic principle of the law of landlord and tenant in India we must look to and see what is implied in the Indian Acts and not the English law. Undoubtedly therefore in my view of the case, the conviction is correct. The landlord was however severely provoked; his tenant was contumacious. So the penalty imposed was negligible to a man in what we are informed is the position of the accused. That was I think, right in this case.

I would discharge the rule.

**Hayward, J.**—I concur. I think it has been established that the complainant's tenancy on monthly rent was extended at most to the end of February 1918. Thereafter he was holding over and no more than a tenant at sufferance, liable for use and occupation of the room to his landlord, accused 1. It must also in my opinion, be held as established that the landlord, accused 1, did with a view to secure possession, direct the Mistry accused 2, to block up the door of the room in the course of the alterations ordered to be made to the buildings towards the end of April 1918. The object was obviously to eject the tenant at sufferance and to put in the other tenant at a higher rent, the photographer, without having to have recourse to the uncertain process of an ejectment suit in face of the recently introduced Bombay Rent Act 2 of 1918.

The question therefore for us to decide is whether the action of accused 1, coupled with that of accused 2, did or did not amount to restraining the tenant at sufferance from proceeding in a direction in which he had a right to proceed within the meaning of Ss. 339 and 341, I. P. C. It has been argued upon this question that the tenant at sufferance was a mere trespasser and had no right whatever to proceed to the room, and in support of this argument a case was quoted in which a landlady was held entitled in somewhat similar circumstances in England to remove the roof of the house of her tenant, in the case of *Jones* v. *Foley* (1). It has also been pointed out that a landlord might in such circumstances himself take possession of his property in England, provided he did not use force and so infringe the Statutes passed against forcible entry referred to in the note to para 1073, Vol. 18, Halsbury's Laws of England. It has been urged that the same law has application in this country on the authority of the case of *Bandu* v. *Naba* (3), in which it was held that such dispossession by the owner was valid, though it was there significantly added "subject to the provi-

(2) [1905] 29 Bom. 213.

(3) [1891] 15 Bom. 238.

sions of S. 9, Specific Relief Act." Reference was also made to the case of *Kantheppa Radai* v. *Sheshappa* (4), where it was held that the possession of a tenant at sufferance was wrongful within the meaning of the Indian Limitation Act. It was however argued in reply that the tenant at sufferance was not a mere trespasser without any right whatever to possession and it was pointed out that he could bring a suit for possession against any other person who was nothing more than a mere trespasser even in England according to Cl. 2, Para 904, Vol. 18, Halsbury's Laws of England. It was admitted that a person who was nothing more than a mere trespasser could not even in this country sue to recover possession on being dispossessed under S. 9, Specific Relief Act, according to the case of *Amirudin* v. *Mahamad Jamal* (5). But it was pointed out that a tenant at sufferance in this country was much more, because he could maintain a suit for possession even against his own landlord who had evicted him otherwise than in due course of law, that is to say, otherwise than by recourse to the civil Courts according to the decision in *Rudrappa* v. *Narsingrao* (2), decided with special reference to the provisions of S. 9, Specific Relief Act. It was accordingly urged that the law obtaining under the Statutes against forcible entry in England was not the same as that resulting from these provisions of the Specific Relief Act in India.

It seems to me that this reply has been well founded and that it would be impossible to hold that the tenant at sufferance in this country has no right whatever to proceed to his room and exercise other similar rights of possession, when such a person has been expressly given the right to protect his possession even against his own landlord, according to the ruling of this Court, under the provisions of S. 9. Specific Relief Act. It would appear that the tenant at sufferance has been recognized to have these limited rights of possession in order to prevent the disorders which would otherwise arise from allowing people in this country to take the law into their own hands and endeavour to obtain possession even when lawfully due to them, without having recourse to the civil Courts. The provisions of S. 9, Specific Relief Act, would appear to differ materially from the Statutes against forcible entry in England. It is not necessary and indeed would not be proper here to decide the substantial question between the parties, namely, whether a tenant at sufferance would or would not be a tenant within the meaning of S. 9, Bombay Rent Act 2 of 1918. That question and all other questions arising between them under the Rent Act would be matters properly for decision in regular proceedings in the civil Courts. The behaviour of the parties has no doubt been petty and entitles neither of them to much respect but it would not in my opinion, be right to treat as merely trivial, as urged on behalf of the accused deliberate endeavours to evade the special provision for settling peaceably disputes between landlords and tenants laid down by law. It is on the contrary requisite to insist by infliction of substantial punishment that landlords and tenants should not take the law into their own hands, but should proceed by regular process in the civil Courts as prescribed in this country by the Indian Legislature.

G P./R.K. *Rule discharged.*

(4) [1898] 22 Bom. 893.
(5) [1891] 15 Bom. 685.

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## A. I. R. 1919 Bombay 99

SCOTT, C. J. AND HAYWARD, J.

*Bhikhabhai Muljibhai Patel*—Plaintiff —Appellant.

v.

*Panachand Odhavji Patel*—Defendant —Respondent.

Second Appeal No. 1105 of 1916, Decided on 12th February 1919, from decision of Joint Judge, Ahmedabad, in Appeal No. 215 of 1914.

**Transfer of Property Act (4 of 1882), S. 53 —Fraudulent transfer is wholly void and not only to extent of want of consideration.**

Where the inferences deducible from the established facts in relation to a conveyance or transfer show that the transferor and transferee had the intention of defeating or delaying the creditors of the transferor, the transaction must, at the option of the person defeated or delayed, be treated as void in toto, and not merely void in so far as there is no consideration.

[P 100 C 2]

*G. N. Thakor*—for Appellant.

*H. V. Divatia*—for Respondent.

**Scott, C. J.**—Joitaram Chhagan and Magan Joitaram traded in grain and cloth in partnership from the year 1908 till April 1911, when Magan died and the

business of the firm came to an end. Eight days after the death of his partner, namely, on 27th April 1911, Joitaram executed two registered documents by which he purported to mortgage practically the whole of his immovable property to the plaintiff for Rs. 5,000 or thereabouts. The property, which was his by right of ownership, was mortgaged for Rs. 4,000, and the property which he held as mortgagee was assigned to the plaintiff as security for Rs. 1,400. In June in the same year the defendant, a creditor of Joitaram, brought a suit against him and obtained a decree in execution of which the properties mortgaged to the plaintiff were attached. The plaintiff then applied that the properties should be sold subject to his lien, but his application was rejected and the plaintiff has brought this suit for a declaration that the defendant is not entitled to attach the properties and bring them to sale. The defendant's case is that the mortgage to the plaintiff was merely intended to defeat and delay the creditors of Joitaram, who was an insolvent at the time, and was not entered into in good faith for valuable consideration. On behalf of the plaintiff it is alleged that the consideration for the transaction was an already existing debt in respect of four loans, previously made by the plaintiff to Joitaram of Rs. 2,000, 1,200, 1,300 and 1,000, amounting in all to Rs. 5,500.

The findings of the lower Courts establish that this case of four existing loans as a consideration for the mortgage transaction is entirely false, and that the only sum for which the plaintiff was a creditor of Joitaram at the time was possibly Rs. 1,300, but more probably Rs. 1,000. The value of the properties mortgaged, apart from those of which Joitaram was the mortgagee, was about Rs. 4,000 and in this appeal we are only concerned with that mortgage for Rs. 4,000. The finding of the lower appellate Court is that :

"it is, to say the least of it, very doubtful, whether the transaction was intended to be a genuine mortgage at all. It purported to be a mortgage with possession, but the plaintiff never got possession, and though Joitaram executed some rent-notes in his favour, he never paid any rent. The explanations given of this are very unconvincing. If this was a real mortgage, and not a sham, one cannot understand why the plaintiff took no steps to exercise his rights under it and insist on the payment of rent."

The learned Judge also holds that considering the circumstances in which the transaction took place, good faith on the plaintiff's part is out of the question. The inevitable conclusion appears to be that the plaintiff and Joitaram were in collusion in framing a mortgage deed upon a false consideration of Rs 4,000, whereas the only sum owing did not exceed Rs. 1,300, and considering the financial condition of Joitaram one must conclude that the parties were in collusion for the purpose of screening Joitaram's property from his creditors.

The only question which gives rise to any difficulty is whether the plaintiff is entitled to a declaration that he has a lien to the extent of the debt existing at the time of the mortgage. The case must be decided according to the provisions of S. 53, T. P. Act, for although there has been no suit to avoid the mortgage, the action of the defendant is tantamount to an avoidance if he has the right to avoid it as a creditor defeated or delayed. S. 53, so far as is material, provides that every transfer of immovable property, made with intent to defeat or delay the creditors of the transferor, is voidable at the option of any person so defeated or delayed, but nothing in the section shall impair the rights of any transferee in good faith for valuable consideration. There can be no doubt that the mortgage is a transfer of immovable property, and that the plaintiff is a transferee, and upon the findings of fact there can be no doubt that the plaintiff is not a transferee in good faith. Therefore the concluding words of the section do not apply to his case. The inferences deducible from the established facts show that both the transferor and the transferee had the intention of defeating or delaying the creditors of the transferor, and under those circumstances it appears to us that the document must, at the option of the person defeated or delayed, be treated as void in toto, and not merely as void in so far as there is no consideration.

In May, on Fraudulent and Voluntary Dispositions of Property, Edn. 3, p. 63, it is stated, as the result of the English authorities, that a fraudulent intention, to which the purchaser was a party, will override all inquiry into the consideration, and among the cases cited in support of that proposition is *Ex parte Chaplin In re Sinclair* (1), where a transfer was stated to be for a considera-

(1) [1884] 26 Ch. D. 319.

tion which was entirely false, although there was some consideration proceeding from the transferee, and Fry, L. J., held that the whole deed was void under the statute of Elizabeth. Similarly in *Hakim Lal* v. *Mooshahar Sahu* (2) Mookerjee, J., states, after an exhaustive discussion of the authorities, that a conveyance or transfer, whether founded on a valuable or adequate consideration or not, if entered into by the parties thereto with the intent to hinder, delay, or defraud creditors, is void as to them. It has been contended on behalf of the appellant that the judgment in *Hakim Lal* v. *Mooshahar Sahu* (2) is inconsistent with that in *Rajani Kumar Dass* v. *Gaur Kishore Shaha* (3). In the latter case however at p. 1057, we find the following passage:

"It has not been shown by any evidence, which may be said to be cogent, that the transaction of mortgage between the plaintiffs and the Deb defendants was entirely fraudulent, or for a grossly inadequate consideration and was intended only to defeat or delay the realization of the dues of the Dass defendants. If the considerations, for the mortgage (we use the plural number to include the two different sums—Rs. 4,853 and Rs. 3,647—which make up Rs. 8,500) could not be separated from each other, there would be good grounds for holding that the transfer evidenced by the deed was fraudulent. In that case the failure of consideration to the extent of Rs. 3,647, taken with the other proved facts, would lead to a reasonable conclusion that the mortgagees intended to help the mortgagors to defeat the realization of the debt covered by the hatchitta in favour of the Dass defendants. Such conduct on the part of the mortgagees and mortgagors would lead to the inference that they were acting in collusion."

Then further on the Court indicates with regard to the Rs. 3,647, as to the reality of which as part of the consideration there was some doubt :

"it might . . . . be that the plaintiffs had a bona fide intention of advancing the additional sum for enabling the mortgagors to carry on their business, that they put off payment until the money was needed or until registration of the deed, but that as the Dass defendants either commenced their suit, or were about to do so for a larger sum than Rs. 3,647, the plaintiff withheld payment of the additional sum. They might not have had any such intention as would invalidate the instrument under S. 53, T. P. Act. Their moral turpitude in making a false case afterwards in the present proceedings would not be sufficient to deprive them of their legal rights, though a false case might reflect discredit on the original transaction."

It appears from this that the judges in that case did not in any way dissent from the law as laid down in the earlier volume. Being of opinion then that the consideration stated in the mortgage deed must in the circumstances of the case be treated as one and indivisible, we are of opinion that the plaintiff's case must fail. We therefore affirm the decree and dismiss the appeal with costs.

G.P./R.K. *Decree affirmed.*

(2) [1907] 34 Cal. 999.
(3) [1908] 35 Cal. 1051.

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## A. I. R. 1919 Bombay 101

HEATON AND HAYWARD, JJ.

*Balkrishna Motiram Gujar*—Defendant—Appellant.

v.

*Shri Uttar Narayandev*—Plaintiff—Respondent.

Second Appeal No. 449 of 1917, Decided on 11th November 1918, from decision of Dist. Judge, Thana, in Appeal No. 32 of 1916.

**Hindu Law--Adoption—Grant by adoptive father in favour of charity even with consent of natural father is not valid and is not binding on adopted son.**

An agreement entered into at the time of adoption between the adoptive father and the natural father of the adoptee for reasonable provision for the widow of the adopter ought to be upheld as valid according to general custom modifying the strict terms of the Hindu law. But there can be no general extension of the modification so as to include reservations in favour of charities and religious endowments. The burden of establishing any such extension would lie upon the person seeking to prove such modifications of the strict rules of Hindu law. [P 103 C 2]

Where therefore on the occasion of an adoption the adoptive father with the consent of the natural father of the adoptee made a grant of an annuity in favour of a temple :

*Held* : that the grant was invalid and was not binding upon the adopted son. [P 103 C 2]

*P. B. Shingne*—for Appellant.

*A. G. Desai* for *Y. M. Kamat*—for Respondent.

**Hayward, J.**—The plaintiff, a manager of a temple, sued to recover Rs. 20 a year due for three years on a grant for providing lights in the temple under a document termed a vyavasthapatra executed by the deceased Motilal. The defendant pleaded that the grant was invalid owing to his adoption at the time of the execution of the vyavasthapatra by the deceased Motilal. The Subordinate Judge held at the trial that the grant was not invalid as the adopted son's natural father had consented to it at the time of the execution of the vyavasthapatra by the deceased Motilal. This decision was affirmed on first appeal by the District Judge, and the matter has now been brought for final decision

in second appeal to this Court. It is admitted that the case concerns ancestral property and that the natural father did consent on behalf of his son to this grant towards lighting the temple as thus described in the vyavasthapatra :

"I have become old and I have been ill for many a day. According to the ways of this mortal world there is no saying when death will come . . . . I entertaining a desire to take a boy in adoption and with a view that my lineage should continue and after my death my funeral and other death ceremonies should be performed . . . . I have this day taken Bababhai's son Vallabhdas in adoption. Therefore . . . . I execute this deed of management regarding the manner in which the management should take place after my death . . . . I will maintain my adopted son Balkrishna during my lifetime and after my demise my brother Bababhai Vithaldas should maintain him. And for that purpose he should get (every year) annually one hundred rupees (100), and the management of the estate should be carried on on behalf of the boy till he attains the age of 21 years by Bababhai . . . . Out of the yield of the next three years' income after keeping aside Rs. 100 for the maintenance of the long lived Balkrishna, the balance (so remaining) should be expended every year towards performing permanently the following charitable deeds . . . . For the purpose of lighting lamps in the temple oi Shri Uttar Narayan situate at Alibag Rs. 20 should be paid every year . . . . The sum mentioned above that is indicated to be expended towards performing the charitable deed is to be expended after three years' income will have accumulated and the charitable deeds should be performed out of the interest over that sum (so accumulated) . . . . The religious (charitable) deeds referred to above should be permanently carried on after my demise . . . . And this religious charitable deed is an hereditary one to be performed from generation to generation from son to grandson after my demise . . . . On my estate there is a charge created for the sums to be expended on the charitable deeds."

It appears to me that the intention was that the grant should be paid out of the interest to be received on three years' accumulation of the income of the estate after the death of Motilal. The document was, it is true, styled vayavasthapatra and not a mrutyupatra, but it must, in my opinion, be taken to have been, upon a true interpretation of its terms, a will, as it was intended to take effect after the death of Motilal.

It has not been denied that an alienation would have been good if made before the adoption by Motilal who was the sole survivor of the joint Hindu family. But it has been argued that this particular grant was invalid notwithstanding the consent of the natural father, as it was to take effect subsequently after the death of the testator Motilal. It appears that the authorities are by no means clear as to the effect of such agreements entered into at the time of the adoption on behalf of a son by the natural father. It was at one time sought to uphold such agreements as binding contracts as in the cases of reservations for widows in *Vinayak Narain Jog* v. *Govindrao Chintaman Jog* (1), *Chiko Raghunath Rajadiksh* v. *Janaki* (2), *Laksami* v. *Subramanya* (3) and *Narayanasami* v. *Ramasami* (4). But these decisions were not followed in a similar case of *Jagannatha* v. *Papamma* (5), relying upon certain remarks by the Privy Council. It was stated that such agreements would not be void and might be ratified subsequently by the son in the case of *Ramasami Aiyan* v. *Venkata Ramaiyan* (6) and doubts as to their validity were expressed in the case of *Bhaiya Rabidat Singh* v. *Indar Kunwar* (7) by the Privy Council.

On the other hand the reservation of rights for the widow was held valid by custom modifying Hindu law in the case of *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai* (8) and again gifts to daughters were held valid though the ratio decidendi was not clearly expressed in the case of *Basava* v. *Lingangauda* (9). An agreement however by the natural father for a gift being made to the brother's widow was held invalid in the case of *Venkappa* v. *Fakirgowda* (10). The decision appears to have proceeded on the reasoning in *Ravji Vinayakrav's* case (8) and the ratio decidendi would appear therefore to have been that such an arrangement was not in accordance with any custom modifying Hindu law. There was another case quoted before us which was not however exactly in point, in which an agreement made by the adopted son himself who was a major was held binding as a family arrangement. The case is *Kashibai Ramchandra Ghatge* v. *Tatya Genu Pawar* (11). It would appear that that case also was decided, in view of the re-

(1) [1869] 6 B. H. C. R. A. C. J. 224.
(2) [1874] 11 B. H. C. R. 199.
(3) [1889] 12 Mad. 490.
(4) [1891] 14 Mad. 172.
(5) [1893] 16 Mad. 400.
(6) [1878-80] 2 Mad. 91=6 I. A. 196 (P. C.).
(7) [1889] 16 Cal. 556=16 I. A. 53 (P. C.).
(8) [1887] 11 Bom. 381.
(9) [1895] 19 Bom. 428.
(10) [1906] 8 Bom. L. R. 346.
(11) [1916] 40 Bom. 668=36 I. C. 546.

ference to a family arrangement as a matter entirely of Hindu law. A clear statement of the objections to supporting such agreements as contracts was made in the referring judgment of Subrahmania Aiyar, Offg. C. J., in *Visalakshi Ammal* v. *Sivaramien* (12). The matter was expressed by Benson. J., in the final judgment (p. 586) thus after reciting the various decisions by Hindu Judges:

"I think that great weight must be attached to the decisions of such men on a question like the present, which I regard as one of Hindu law modified by Hindu custom and usage developed in accordance with the conceptions of the present time. It is to be observed that there is no text of Hindu law which either recognizes or prohibits such an agreement as the present being entered into, and it is certain, as remarked by West and Bubler's 'Hindu Law, Edn. 3, p. 1106, that in actual practice 'fair arrangements for the protection of the widow's interest during her life are commonly made, and are always supported by the authority of the caste."

And again at p. 587:

"I cannot but think that this principle ought to guide the Courts in considering whether agreements like the one under consideration can be upheld or not. If the stipulations are unreasonable, such as giving to the widow an absolute power of disposition over the property, they should be rejected as ultra vires of the father; if reasonable, such as only to define and limit the son's enjoyment of the property, they should be upheld . . . If the agreement is such as to be inconsistent with the fundamental idea underlying adoption and the purpose for which it is sanctioned by Hindu law, as, for instance, if it deprived the adopted son of all rights to the property of the adoptive father and so left him without any means of performing the necessary religious offices towards the manes of his adoptive father and his ancestors, it may well be that the Courts would regard the condition as essentially repugnant to Hindu law and would refuse to uphold it. But it would seem that a fair and reasonable disposition of the property is not essentially repugnant to Hindu law."

The reservation in favour of the widow upon these principles was held binding according to Hindu law by the Full Bench. The statement of Subrahmania Aiyar, J., was quoted with approval in the referring judgment of Beaman, J., in the case of *Vyasacharya* v. *Venkubai* (13). It was decided there in the final judgment that the reservation in favour of the daughter was invalid, relying upon the decision in *Venkappa* v. *Fakirgowda* (10). The general question referred was not decided by the Full Bench, but the reasoning proceeded (p. 262 of *I. L. R.* 37 *Bom.*) upon the rules of Hindu law.

(12) [1904] 27 Mad. 577 (F. B.).
(13) [1912] 37 Bom. 251=17 I. C. 741 (F. B.).

It would appear to have been established by these decisions that agreements for reasonable provision for widows ought to be upheld as valid according to general custom modifying the strict terms of Hindu law. But no authorities have been quoted before us in favour of any other persons in such connexion or in support of a general extension of the modification so as to include, as here claimed, reservations in favour of charities and religious endowments. The burden of establishing any such extension would lie upon the person seeking to prove such modifications of the strict rules of Hindu law. That burden has here not been discharged. No evidence whatever was adduced to show that reservations in favour of religious endowments have by custom been recognized as appropriate on such occasions and no texts have been quoted to prove that they would be permissible on such occasions under the strict rules of Hindu law.

We ought therefore in my opinion, to decline to recognize the extension claimed and we ought to hold that the grant in favour of the temple was invalid as not having been recognized by custom to be appropriate at the time of adoption or binding upon the adopted son in modification of the strict rules of Hindu law. The appeal ought therefore, in my opinion, to be allowed and the suit dismissed with costs throughout.

**Heaton, J.**—I concur.

G.P./R.K. *Appeal allowed.*

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## A. I. R. 1919 Bombay 103

HEATON AND HAYWARD, JJ.

*Waman Dinkar Kelkar* and *another*—Accused—Appellants.

v.

*Emperor*—Opposite Party.

Criminal Appeals Nos. 36 and 37 of 1918, Decided on 3rd July 1918, from convictions and sentences passed by Sessions Judge, Satara.

**Criminal P. C. (5 of 1898), S. 476—Forgery of kabuliyat filed by inamdar in mamlatdar's Court detected in appeal—Explanation called and District Magistrate referred for assistance of police—Sanction to prosecute granted—Inamdar and mamlatdar both convicted in Sessions—On appeal it was held that the whole case is to be referred to nearest Magistrate — Subsequent clause refers to offenders then known—Criminality of offender even if known in subsequent inquiry not in main proceedings does not prevent his**

**prosecution being sanctioned—Delay should be avoided--It does not mean that inquiry must be made during judicial proceeding or immediately after — Reference to District Magistrate for police help not in judicial capacity held did not oust jurisdiction.**

A case came before an Assistant Collector on appeal against the decision of the Revenue Court of a mamlatdar : the Assistant Collector being suspicious that a forged kabuliyat had been used by the plaintiff, an inamdar, called on him for an explanation which he received along with a report by the mamlatdar. The Assistant Collector then applied for the assistance of the Criminal Investigation Department from the District Magistrate, and a full report was submitted to him by the Deputy Superintendent of Police. He then referred the matter for inquiry to the nearest First Class Magistrate, which resulted in both the inamdar and the mamlatdar being committed to the Court of Session where they were convicted, the former under Ss. 209, 471, 219 and 109, Penal Code, and the latter under Ss. 466 and 219 of the Code. On appeal to the High Court it was objected : (a) that even if the offence was brought under notice in the judicial proceedings of the Assistant Collector as regards the inamdar, it was not so brought to notice as regards the mamlatdar; (b) that the whole of the preliminary inquiry should have been made by the Assistant Collector who, after his reference to the District Magistrate, was functus officio and consequently his order under S. 476, Criminal P. C., was without jurisdiction, (c) that there was delay in proceeding under S. 475 and the delay was fatal :

*Held* : (1) that under S. 476, it was the case which was to be sent for inquiry to the nearest Magistrate and not necessarily all the offenders who might be concerned in the commission of the offence, the subsequent clause of the section referring only to such offender or offenders as might at that time be known and be within the grasp of the inquiring officer; (2) that the reference to the District Magistrate did not deprive the Assistant Collector of jurisdiction, as the reference was made merely to that officer as the executive controller of the police and not to him in his judicial capacity as the District Magistrate; (3) that although it was expedient that speedy action should be taken, there was nothing in the section itself or in the reasons for its enactment to hold that officers acting under it were bound to make their inquiry in the actual course of the judicial proceeding, or so shortly thereafter as to make it a continuance of those proceedings the section was enacted not with the intention of protecting offenders against public justice from prosecutions by the Courts, but to facilitate, wherever and whenever those offencss might come to notice, such prosecutions by Courts. [P 105 C 1, 2 ; P 106 C 1]

*Binning* and *N. V. Gokhale*—for Mamlatdar.

*G. S. Rao*—for Inamdar.

*Velinkar* and *S. S. Patkar*, *Govt. Pleader*—for the Crown.

**Hayward, J.**—These are two appeals against convictions recorded at a trial with assessors by the Sessions Judge of Satara. One appellant is the Inamdar of Patan. The other appellant was the Mamlatdar of Patan. The inamdar has been convicted of having brought a false claim for rent against his tenants, certain Chambhars, in the Revenue Court of the mamlatdar. He has also been convicted of having used as genuine a kabuliyat which had been altered by forgery for the purpose of establishing his claim against those Chambars in the proceedings in the Revenue Court. He has also been convicted of having abetted a corrupt judgment which had been passed against those Chambhars by the appellant mamlatdar in that Court. The convictions were concurred in by both the assessors and he was sentenced to concurrent sentences, which had the practical effect of sending him to prison for five years' rigorous imprisonment under Ss. 209, 471, 219 and 109, I. P. C. The appellant mamlatdar has been convicted of forgery in that he altered the statement as made by the appellant inamdar on the first hearing of the revenue case for the purpose of supporting the claim based on the forged kabuliyat. He has also beeen convicted of having delivered a corrupt judgment against the Chambhars in those proceedings in his Revenue Court. These convictions were concurred in by both the assessors and he was sentenced to concurrent sentences, which had the practical effect of sending him to rigorous imprisonment for five years under Ss. 466 and 219, I. P. C.

The appellants raised a preliminary objection to the trial which was however overruled by the Sessions Judge. They have repeated that objection here. Their objection is based on these facts. The offences which have been the subject of trial arose, as has already been indicated out of judicial proceedings in the Revenue Court of the mamlatdar. There was an appeal from that decision on 8th March 1916 to the Assistant Collector and the decision was, owing to suspicions raised in his mind by the condition of the forged kabuliyat, reversed by him on 18th July 1916 as the appellate Revenue Court. The Assistant Collector in consequence of the suspicions so raised proceeded, on 28th July 1916, to call for the explanation of the appellant inamdar, and, accordingly, on 10th October 1916, a report on the matter was submitted to him by the appellant mamlatdar. The Assistant Collector appears, after consi-

deration of the explanation and the report, to have considered the matter serious and demanding further and closer inquiry. He accordingly on 7th March 1917, applied for the assistance of the Criminal Investigation Department from the District Magistrate. This assistance was granted and on 2nd July 1917 a full report was submitted to him by the Deputy Superintendent of Police. After considering all the matters before him he then passed an order referring the matter for inquiry to the nearest First Class Magistrate under S. 476, Criminal P. C. The result was that the appellants were committed to take their trial before the Sessions Court of Satara.

The appellants upon these facts urged in support of their objection that even if the offence was brought under notice in the judicial proceeding of the Assistant Collector as regards the appellant inamdar, it was not brought to notice as regards the appellant mamlatdar. It has further been urged that the whole of the preliminary inquiry ought to have been made by the Assistant Collector and that he was functus officio after having made his reference to the District Magistrate and had no longer any jurisdiction to pass an order under S. 476, Criminal P. C. It has also been urged that there was delay in proceeding under that section and that that delay was fatal to his jurisdiction in accordance with certain rulings which have been quoted before us of the Madras and Calcutta High Courts. It seems to me however that there is no substance in any of these arguments. It is to be noticed with regard to the first argument that what is provided for is that after making preliminary inquiry into any offence brought to notice, the case may be sent for inquiry to the nearest Magistrate of the First Class, that is to say, it is the case which is to be sent and not necessarily all the offenders who may be concerned in the commission of the offence. The subsequent clause providing the sending of the offender in custody is permissive and would appear to me to refer only to such offender or offenders as might at that time be known and be within the grasp of the inquiring officer. It seems to me, therefore that no solid objection can be taken to the jurisdiction on the ground that the criminality of the appellant mamlatdar was only discovered afterwards in the course, not of the judicial proceedings in the revenue matter, but in the course of the preliminary inquiry into the suspected criminal offence.

Nor does there seem to me to be any more substance in the second argument that the whole inquiry should have been made by the Assistant Collector. It is to be observed that the preliminary inquiry to be made is only such inquiry as may be necessary, and it cannot be denied in this case that some inquiry at least was made by the Assistant Collector himself. It does not therefore appear to me to be a defect which could deprive him of the jurisdiction that he took the precaution of making a more careful and deliberate inquiry with the assistance of the Criminal Investigation Department It seems to me that that was all he did and that his reference to the District Magistrate was merely to that officer as the executive controller of the police and not to him in his judicial capacity as the District Magistrate. It is difficult in any case to see how the reference to the District Magistrate could have deprived the Assistant Collector of jurisdiction under S. 476, Criminal P. C.

With regard to the third argument as to delay it has first to be observed that there was, as a matter of fact, no undue or unreasonable delay. The Assistant Collector's decision in the revenue proceedings was passed on 18th July 1916 and he took action within ten days on 28th July 1916. The rest of the time was occupied in the preliminary inquiry and it cannot, in my opinion, be said to be unreasonable looking to the complicated nature of the case which he had before him. But this third argument is supported by authority, and that authority requires respectful consideration. It has been held in the case of *Rahimadulla Sahib* v. *Emperor* (1) that it is essential to the jurisdiction conferred by the section that the order should be made either at the end of the judicial proceedings or shortly thereafter that it may reasonably be said that the order is part of those proceedings. It was apparently felt that the last sentence required some modification to make it clear, and it was accordingly held in the later case of *Aiyakannu Pillai* v. *Emperor* (2) that the power conferred by the section ought to be exer-

(1) [1908] 31 Mad. 140 (F.B.).
(2) [1909] 32 Mad. 49=1 I. C. 597 (F.B.).

cised either in the course of the judicial proceeding or at its conclusion or so shortly thereafter as to make it really the continuation of those judicial proceedings.

These two decisions were decisions by the Full Bench but were not unanimous. They were however followed by the Calcutta High Court in the case of *Begu Singh* v. *Emperor* (3), in which it was held that the power conferred by the section ought to be exercised immediately after conclusion of the trial. It was followed again in another case by the Calcutta High Court in the case of *Bahadur* v. *Eradatullah Mallik* (4), in which it was laid down that action must be prompt and expeditious in order to be within the jurisdiction conferred by the section. On the other hand there are some obiter dicta of Chandavarkar, J., to the contrary in the case of *In re Lakshmidas Lalji* (5) and those dicta were followed by the Sessions Judge. It seems to me, with every respect to the contrary decisions of the majority of the learned Judges of the Madras and Calcutta High Courts, that the dicta of Chandavarkar, J., in this matter are correct and that to hold otherwise would be to read into the section words of limitation which have not been placed there by the legislature. It is no doubt expedient that action under that section should be taken with as much promptitude as possible. But there does not appear to me to be anything in the wording of the section or in the reasons for its enactment to hold that officers acting under it are bound to make their inquiry either in the actual course of the judicial proceedings or so shortly thereafter as to make it really a continuation of those proceedings. The section appears to have been enacted, not with the intention of protecting offenders against public justice from prosecutions by the Courts, but on the contrary to facilitate, wherever and whenever those offences might come to notice, such prosecutions by the Courts. (After discussing evidence his Lordship observed as follows): It seems to me for these reasons that the appeals of both the inamdar and the mamlatdar ought, on the charges so far discussed, to be dismissed and the convictions and sentences confirmed. But there were other charges against them in respect of another tenant named Dnyanu Gopal. The appellant inamdar was acquitted of having made a false claim against this tenant Dnyanu Gopal but convicted of having abetted a corrupt judgment against him by the appellant mamlatdar. The appellant mamlatdar was convicted of forgery in altering the statement of this tenant Dnyanu Gopal and of having delivered a corrupt judgment against him in the mamlatdar's Revenue Court. The assessors concurred in the acquittal and in the convictions but were divided in opinion as to the forgery of the statement of Dnyanu Gopal. The acquittal was accepted and sentences concurrent with the rest of the sentences were recorded in respect of the convictions by the Sessions Judge. But it is difficult, in view of acquittal of the appellant Inamdar of having made a false claim against this tenant Dnyanu Gopal, to support his conviction for abetting a corrupt judgment against this tenant by the appellant Mamlatdar. It is similarly difficult to support the convictions of forgery in respect of the statement of this tenant Dynanu Gopal and of having delivered a corrupt judgment against him recorded against the appellant mamlatdar. It seems to me therefore that the convictions on these charges ought to be reversed in the case both of the appellant inamdar and the appellant mamlatdar.

**Heaton, J.**—I should like to add one word about the legal point which was argued. I make it very brief, because I am glad to think that legislation will shortly wipe out the present Ss. 195 and 476, Criminal P. C., and in so doing will abrogate the medley of conflicting decisions which we have on those sections. I cannot, after giving the matter my best consideration, hold that S. 476 limits the jurisdiction of a Court in the manner suggested in the Madras and Calcutta cases. There is no limitation of jurisdiction in the words of the section. The limitation is to be found, if it is found at all, by implication. Arguments as to implication in a case of this kind are always such that some will appeal to one mind, some to another. I confess that I myself see more force in the view taken by the two Judges of this Court who have expressed themselves than by the Judges of the Calcutta and Madras High Courts.

(3) [1907] 34 Cal. 551 (F.B.).
(4) [1910] 37 Cal. 642=6 I. C. 801 (F.B.).
(5) [1908] 32 Bom. 184.

Then as to the word "offence in." S. 476. Of course where you have an offence you must have an offender, though you may not know who the offender is. But it seems to me that the section not only intends to, but is expressly worded so that it may confer on a Court a power to inquire into a case and to take action, whoever may prove to be the offender, although months or even years may elapse before it becomes known with any degree of certainty who the offenders are. I agree to the order proposed by my learned brother.

G.P./R.K. *Order accordingly.*

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## A. I. R. 1919 Bombay 107

SCOTT, C. J. AND SHAH, J.

*Basappa Revanshidappa*— Defendant —Appellant.

v.

*Shidramappa Revanshidappa Dhansheti*—Plaintiff—Respondent.

First Appeal No. 307 of 1916, Decided on 10th October 1918, from decision of First Class Sub-Judge, Sholapur, in Suit No. 1175 of 1914.

**(a) Hindu Law— Adoption—Senior widow has preferential right to adopt —No special authority from husband or his sapindas is necessary as in case of junior widow.**

Under the Hindu law, as recognized in the Bombay Presidency, the senior widow of deceased Hindu, that is the widow married first, has a preferential right to adopt. She does not require any special authority from her husband or from her husband's sapindas, but the junior widow, unless the adoption by her is consented to by the elder widow, does require a special authority from her husband. [P 107 C 2]

**(b) Majority Act (1875), S. 2 (a) — Minor arriving at age of discretion is competent to make adoption by virtue of S. 2 (a) — Hindu Law, Adoption.**

By virtue of S. 2 (a), Majority Act a minor who has arrived at the age of discretion is competent to make up adoption.

A Hindu widow, about fifteen years of age, who had been married for two years and had been living with her husband, made an adoption.

*Held*: that she must be deemed to have attained sufficient maturity of understanding to comprehend the nature of the act and that the adoption was therefore not invalid. [P 110 C 2]

*Coyajee* and *N. V. Gokhale*— for Appellant.

*Jayakar* and *P. V. Kane*—for Respondent.

**Scott, C. J.**—Revanshidappa died on 22nd February 1911 leaving two widows Basava and Gaurava. Basava was the first married and on the evidence had attained puberty soon after the marriage of Gaurava to her husband. Gaurava was married by mohtar marriage, being already a widow, whereas Basava was married by lagan according to the approved form. The deceased left property worth about Rs. 15,000. The plaintiff claims as a son adopted to the deceased Revanshidappa by his second widow Gaurava on 6th November 1911. Defendant 1 was adopted by Basava in July 1912. According to the recognized law in this Presidency the senior widow, that is the widow married first, has a preferential right to adopt. In this Presidency she does not require any special authority from her husband or from her husband's sapindas, but the junior widow, unless the adoption by her is consented to by the elder widow, does require a special authority from her husband. The earliest statement of the law that we can find relating to this Presidency is in Steele on Law and Custom of Hindu Castes p. 48, where he says:

"If there be two widows, they ought to adopt by mutual consent; otherwise the elder should have the preference in point of right. It is inferred that the younger may adopt by order of the elder, not without it."

The meaning of the word "elder" in this passage in Steele is not "elder in years' necessarily, but "elder in married life' so far as the deceased is concerned. On p. 31 the following passage occurs as to precedence among wives:

"Of several wives, being of the Brahman caste, the one first married enjoys the precedence; if they are of different castes, the Brahmance is considered the elder. The elder wife sits by her husband at marriages and other religious ceremonies, is head of the family, and entitled to adopt a son on her husband's death without sons."

Yajnavalkya's text (verse No. 84 in Achara Adhyya) and Vijnanesvara's commentary thereon make it clear that the senior wife is entitled to perform all religious acts in preference to the junior wives. The seniority there referred to is not the seniority of age but seniority in marriage : see Srisa Chandra Vidyarnavā's Translation of the Mitakshara, Achara Adhyaya, recently published by the Panini Office at Allahabad, p. 177. The plaintiff's case therefore rests upon an alleged special authority given by Revanshidappa to Gaurava. It is said that an hour or two before his death Revanshidappa executed a will in which he gave special authority to Gaurava to adopt. The will is alleged to have been

executed under the following circumstances: The younger brother of Revanshidappa died of plague on 18th February 1911, and on the 20th Revanshidappa himself was attacked. He was then only twenty years of age. Basava, his senior widow, was in the house. Gaurava, the junior widow, was at Gadag from which place she was summoned by wire. Revanshidappa's grandfather's sister's son who is defendant 3, Shidappa, stood to Revanshidappa in loco parentis, having been appointed guardian of his property in 1903 or 1904 by order of the District Court in Sholapur. Shidappa was living in Sholapur close to the house of Revanshidappa, and he was with him at the time of his illness and death. Revanshidappa died at 11 a. m. on Wednesday the 22nd. The plaintiff's case is that he was treated for plague by a Hakim Imam Saheb; that he told Shidappa to call his clerk Ramaya in order that a will might he written, and that between 9 and 11 a. m. on that day a will was dictated by the deceased to Ramaya and was executed by him in the presence of several persons, and was attested inter alia by Shidappa. Two of the other attesting witnesses are said to have been Khan Bahadur Pir Saheb and one Baslingappa. Shidappa entirely denies the story. Gaurava and her father who is said to have been present, affirm it. The onus of proof is upon the plaintiff. First as to the probability of the story. The attack of plague from which Revanshidappa was suffering was a very violent one. He died within two days of the attack. The report on the bubonic plague published in 1897 remarks that

"the usual course of fatal attack is four to five days. Delirium and obscuration of the mental faculties are almost invariably met at some period in this disease, although mild cases are met with which never become delirious or show mental confusion. The character and amount of delirium vary greatly, and present no relation to the severity of the attack. Of 100 consecutive cases mental aberration or delirium was present in 74 at some period. The patient is apathetic, hesitating, stupid, and his mental faculties blunted and confused whilst he appears irritable and does not like to be disturbed. Delirium appears early, often at the very beginning of the disease, and is most marked at night throughout. Sometimes patients appear wakeful and delirious by night and stupid, drowsy and comatose by day. If the patient is about to recover delirium ceases."

There is evidence that on Tuesday Revanshidappa spoke coherently but afterwards became unconscious and towards nightfall he began to talk, as the vernacular record shows, "ghabrya ghabrya," that is either in a frightened manner or in a confused manner. At 9 o'clock on Wednesday he must obviously have been at the point of death. Yet it is stated that he dictated a will (not a long one it is true) and sat up of his own accord on the bed after it had been dictated and signed it. That appears to us to be extremely unlikely. The senior widow Basava was present all the time and denies that any will was made. The junior widow who adopted the plaintiff says that a will was made containing an authority to adopt in her favour, and she is supported by her father, obviously an interested witness. Of the witnesses who can be called prima facie disinterested there are Pir Saheb and Baslingappa. Now Pir Saheb will not go so far as to say that an authority to adopt was given to Gaurava. He does say that the deceased made a will on the Wednesday morning and that it contained an authority to adopt, but he cannot say in favour of which widow the authority was given.

Baslingappa is a witness whose evidence must be regarded with the greatest suspicion. He was the person who identfied Gaurava before the Registrar as the executant of the adoption deed executed on 6th November 1911. He must therefore have been particularly well known to Gaurava, and Gaurava within a very few days of the execution of that deed instituted criminal proceedings against Shidappa charging him with the concealment of Revanshidappa's will, and as is usual, she handed to the Court a list of her witnessess in support of her case. That list did not contain the name of Baslingappa. At a later stage however she informed the Court that the witnesses she had proposed to call had turned hostile, and she therefore proposed to call other persons in support of her case. Among those other persons was Baslingappa. It seems incredible that if Baslingappa had really been present at the time of the execution of a will by Revanshidappa, the execution of which was denied by Shidappa, and in respect of which criminal proceedings were instituted against Shidappa, Baslingappa's name should not have been prominently put forward at the outset of the proceedings as a witness in support of the complainant's case. It became necessary at a late

stage that further support for her case should be forthcoming because Pir Saheb proved to be, from the complainant's point of view, a very unsatisfactory witness since he was not prepared to say that there had been any testamentary authority to adopt conferred upon the complainant. Therefore a fresh support was introduced, and this fresh support was Baslingappa. He is a witness who is prepared to go as far as the plaintiff requires, for not only does he testify to the making of the will and the conferring of authority to adopt upon Gaurava, but he alone of all the witnesses supports Gaurava in the assertion that for several months before her adoption of the plaintiff Shidappa was pressing her to adopt his nephew. That is a story which, it may be said incidentally, it is very difficult to accept, for this reason that the nephew was the only son of Shidappa's brother and would presumably inherit both to Shidappa and his father, and it is not disputed that Shidappa was a man in well-to-do circumstances of life doing business as a trader in Sholapur. People are not ordinarily disposed to give only sons in adoption, and there does not seem to have been in this case the inducement of any considerable property which would induce these two well-to-do brothers to consent to the transfer of the only male descendant into another family.

The evidence of Pir Saheb is open to considerable suspicion. The learned Judge who heard him in the trial Court speaks of him as a very half hearted lukewarm and unwilling witness showing proclivities in favour of the defence. Defendant 3, Shidappa denies that Pir Saheb was present at all, and if we come to probabilities there does not seem any reason why Pir Saheb should have consented to go into the room of Lingayat who was dying of a virulent attack of plague in order to be able to give evidence as to the execution of a will. The improbability is emphasized when we notice that Pir Saheb himself observes that he did not stay until the end of the proceedings in connexion with the execution of the will because he was anxious to get away. It is clear that we do not know the whole truth about Pir Saheb and why he gave the evidence he did. He does not however in any way help the plaintiff's case for we cannot say that he supports the story of an authority conferred upon Gaurava. Another difficulty in the proof attempted by the plaintiff arises in connexion with the Imam Saheb or Hakim who is said to have attended Revanshidappa. He is not called and no evidence has been given to show that he could not have been called.

Ramaya the alleged writer of the will is dead. But it is to be observed that his death occurred a month or two before Gaurava determined to institute criminal proceedings against Shidappa charging him with concealment of the will.

Much reliance has been placed on behalf of the plaintiff upon a post card dated 29th April 1911 addressed by Shidappa to Gaurava's father at Gadag, because it contains a reference to taking a boy in adoption. But when the post card is read as a whole the reference is of a very equivocal character, and by no means goes to support the plaintiff's case rather than that of the defendant. The reason of writing the post card was that Gaurava's father had written to say that he was coming alone from Gadag. Shidappa said:

"Do not come alone, all the people round our house are come back and are living in peace. Among them our house only is still vacant and people are much grieved to see it, and as the time of taking a boy in adoption is drawing near the Panchas and the Nazir are very much pressing. You should therefore bring with you Gaurava without fail."

Now Gaurava was nineteen years of age. Basava, who was living with her parents at Valsang, both of them having left Sholapur on account of plague, was only thirteen or fourteen and she could not return alone to open her husband's house. If however Gaurava returned there would be no difficulty in Basava returning also, and we find that Gaurava did return in May, probably in consequence of the post card, with her father, and a short time afterwards Basava came also from Valsang. The reference to the adoption appears to be thrown in merely as an extra inducement to Gaurava's father to fill up the house. The Panchas referred to are probably the Panch of the Lingayat community, and the reference to the Nazir is no doubt to the Nazir of the Sholapur District Court who was charged with the care of minors' estates, Shidappa himself being the actual guardian appointed by the Court of the property of the deceased Revanshidappa. It is natural enough that both the Panch and the

Nazir should ask Shidappa whether a boy was not going to be adopted, and that is, as it seems to us, a natural and sufficient explanation of the passage in the post card with reference to adoption.

The next document of importance in the case is a notice published by Shidappa in a Sholapur newspaper at the time when he was leaving for Bijapur on a few days' visit. In that notice which is addressed to Gaurava he states that he has heard that she is about to make an adoption and warns her not to do it as she is not authorized. On the very next day an answer appeared in the Sholapur paper, obviously the work of some lawyer, in which Gaurava asserted the case which is now put forward on behalf of the plaintiff, namely of the execution of a will and charging Shidappa with its possession. Shidappa on his rerurn from Bijapur in two or three days went off at once to Gulburga where was living the boy who is now defendant 1, and who was adopted in July 1912 by Basava. On his return he was arrested on the criminal charge, and the proceedings under that charge dragged on for several months. The Magistrate eventually discharged the accused, and an application in revision to the Sessions Judge was dismissed.

Thereafter this suit was instituted. The learned Judge in the trial Court has come to the conclusion that the plaintiff has established his case. It does not appear to us however that he has kept before him the point of crucial importance that the onus is on the plaintiff, and that if the plaintiff does not prove clearly and conclusively a special authority to adopt conferred upon Gaurava, he has no title to the property in suit. The learned Judge recognises that Pir Saheb is an unsatisfactory witness, but he does not appear to recognise that Pir Saheb has never gone so far to say that there was any authority given to Gaurava to the exclusion of Basava and although he recognises the difficulty of accepting Baslingappa's evidence in consequence of the manner in which he was brought forward as a witness at a late stage in the criminal proceedings, he appears to give fullest credence to his evidence.

We are also unable to agree with the learned Judge as to the construction to be put upon the post card, Ex. 95, which, as already pointed out, has by no means any conclusive weight in favour of the plaintiff. Upon the evidence we are unable to accept the finding of the learned Judge. We cannot hold that the plaintiff has discharged the onus which is upon him, and has made out a case which would have the effect of disinheriting Basava or any son whom she might adopt. This brings me to the finding of the learned Judge upon the question whether defendant 1 has been validly adopted in law. He holds that he has not been validly adopted on the ground that Basava at her age was incapable of selecting defendant 1, and that he had not been selected by Ravanshidappa himself. The law upon this point is stated by Bauerjee J. in *Mondakini Dasi* v. *Adinath Dey* (1). He observes:

> "The Majority Act (9 of 1875) provides that nothing contained in that Act shall affect the capacity of a person to act in matters relating to adoption. It has been decided by this Court in the case of *Rajendro Narayan Lahoree* v. *Saroda Soonduree Dabee* (2) that a minor who has arrived at the age of discretion is competent to give permission to adopt, and this decision has been approved by the Privy Council in *Jumoona Dassya* v. *Bamasoondari Dassya* (3). What is meant by the age of discretion in these cases is not clearly stated, nor is there anything to show that at the date of the adoption in question Biraj Mohini had not attained sufficient maturity of understanding to comprehend the nature of the act. It should also be borne in mind that in this case the authority to adopt was given by a person of full age, and the validity of the adoption is questioned on the ground that the person who exercised that authority was a minor. Upon this point there is a case given in Macnaghten's Precedents of Hindu Law (Ch. 6, case 5) in which the Pandit's opinion was to the effect that the nonage of the widow is no obstacle to an adoption by her."

Similarly in the present case there is nothing to show that at the date of the adoption in July 1912 Basava had not attained sufficient maturity of understanding to comprehend the nature of the act. In fact she was about fifteen years of age, and there is no reason to presume that a Hindu girl of that age who has been married for two years or more, living with her husband, does not realise what is meant by taking a son in adoption. We therefore cannot accept the finding of the learned Judge as to the adoption of defendant 1. The result is that the decree must be reversed and

(1) [1891] 18 Cal. 69.
(2) [1871] 15 W. R. 548.
(3) [1875-76] 1 Cal. 289=3 I. A. 72 (P. C.).

the plaintiff's suit dismissed with costs throughout.

**Shah, J.**—I concur.

G.P./R.K. *Suit dismissed.*

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## A. I. R. 1919 Bombay 111

HEATON AND SHAH, JJ.

*Ramnarayan Amarchand* and *another* —Accused—Appellants.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 53 of 1919, Decided on 25th February 1919, from convictions and sentences passed by First Class Magistrate, Poona.

**Criminal P. C. (1898), Ss. 235 and 239—Charges in respect of items in two balance sheets of company—Joint trial of these charges held illegal—They could not be part of same transaction.**

**Accused, who were the agents, Secretaries and Treasurers of a Company, were convicted upon charges of (1) cheating and criminal misappropriation in relation to the balance-sheet of the Company for 1912, inasmuch as in that sheet a profit was shown, which they had taken, whereas the Company had not earned a profit; and (2) wilfully making a false balance sheet of the Company for 1913. The accused were tried jointly on five charges, four of which related to the balance-sheet of 1912 and one to the balance-sheet of 1913. In the trial Court it was objected on behalf of the accused that there could not be a joint trial of the charges relating to the two balance-sheets, but the objection was disallowed on the ground that the offences relating to these balance-sheets formed part of the same transaction. On appeal to the High Court :**

**_Held_ : that the trial was illegal and the convictions could not be maintained. The different acts attributed to the accused in respect of the two balance-sheets did not form part of the same transaction within the meaning of Ss. 235 and 239, and the joinder of the charges, was contrary to the provisions of the Code. [P 112 C 2]**

*Coyajee, G. N. Thakor, Velinkar* and *L. J. Apte*—for Appellants.

*Strangman, Ranganekar* and *S. S. Patkar*—for the Crown.

**Heaton, J.**—This is an appeal by two persons who were convicted by the First Class Magistrate of Poona. It was transferred by this Court for hearing from the Court of the Sessions Judge of Poona to this Court. The case relates to a Company which for brevity's sake is called the Poona Mill. It had been working as a mill from about the year 1894 with not very fortunate results, though it survived until 1915, in which year the Company went into liquidation and has since been wound up. The accused were for a good many years the Agents, Secretaries and Treasurers of the Company, and it is in relation to the balance-sheets for the years 1912 and 1913 that criminal accusations have been made against them. I need not go into details further than this; the charges in relation to the balance-sheet for 1912 were based on the allegation that in that year the mill had not by its working earned a profit, but that a profit was shown in the balance-sheet and that in so doing and in taking the profit declared, the accused, who it is said, were really responsible for the preparation of the balance-sheet, committed the offences of cheating and criminal misappropriation. When the balance-sheet for 1913 took its final shape which was not until June 1914, the new Companies Act, had come into operation, and under that Act in virtue of S. 282 it is a criminal offence to wilfully make a false statement in a balance-sheet. No charge under this section was possible in relation to the balance-sheet for 1912, but this was the charge made in regard to the balance-sheet for 1913.

The trial and the appeal had a somewhat unfortunate course. At the trial itself a very large mass of evidence was recorded and a large number of details were minutely inquired into. The Magistrate has dealt with this mass of evidence and with these details in a lucid way but it does seem to us that much of the evidence and many of the details might have been spared had there been a more painstaking and intelligent inquiry into the affair before it was brought into the Magistrate's Court. As the result of the trial before the Magistrate which, considering the mass of evidence he had to deal with, was not unduly prolonged, the accused were convicted of all the charges. After the appeal was transferred to this Court there was a most unfortunate delay due to the preparation of translations of the many papers. We are not concerned with the cause of that delay at the moment. But it has attracted our notice and I certainly do profoundly regret that such a delay should have occurred in the disposal of a criminal appeal in this Court. When charges were framed in the Magistrate's Court, exception was taken to them on behalf of the accused. It was urged that there could not be a joint trial of the charges relating to the balance-sheet of 1912 with the charge relating to the balance-sheet of 1913. It was argued for the prosecution, as we think most

mistakenly, that the joint trial could proceed, because the offences relating to these balance-sheets could be regarded as parts of the same transaction. We think not and the result is that the trial is illegal and the conviction connot be upheld.

Before saying why we think this, I must remark that I think where prosecutions of this kind are conducted, where you are dealing with complicated and extensive matters, it is most important that the prosecution should not urge the joint trial of matters as to the joint trial of which there could be any doubt. It does not in the long run save time or trouble. And where there are several matters in contest, if the prosecution will select that on which they have the best case, they will undoubtedly to my thinking in the long run save time and further the ends of justice. Now here there were jointly tried matters relating to two totally distinct affairs, one being the balance-sheet for the year 1912, the other the balance-sheet for the year 1913. It is said that both of them were prepared in pursuance of a policy of deception, that the Company was really insolvent as early as the year 1910 and that the subsequent balance-sheets were prepared falsely with the deliberate purpose of concealing this practical insolvency; and it is said that because this was so, the preparation of these two balance-sheets for successive years was in reality but one transaction. The word " transaction " used in the Criminal Procedure Code is not defined. Its meaning has frequently been illustrated by cases which are in the books, but in the long run we have to deal with every case that arises on its own facts. Knowing the general idea of the words " the same transaction," we have to determine whether these words do or do not apply to the particular facts of a particular case. Here it seems to me that to apply the words " the same transaction " to these two separate proceedings is to confuse the meaning of those words with the idea of things that are done in pursuance of a conspiracy. From the prosecution point of view it is perfectly correct to say that both these balance-sheets were prepared in pursuance of a conspiracy.

One only has to think over the matter, a little carefully, however to see that this idea of a conspiracy covers a very great deal that cannot be included in the idea of " the same transaction." If we were to take those words as covering a case of this kind, it would lead us to treat the same acts of misconduct or fraud however often repeated, as constituting the same transaction, if there was the same general purpose underlying the repeated acts. But something far more than that is required before separate proceedings can be brought within the meaning of the words " the same transaction." I cannot I confess, think of any way of describing the preparation of these two balance-sheets so as to bring them within the true idea underlying the words " the same transaction." I regard the preparation of these two balance-sheets as entirely separated occurrences.

The balance-sheet for the year 1912 was prepared from the accounts of that year. It related to the affairs of that year and had for its purpose the presentment, truly or falsely of the condition of the Company as the agents wished it to appear in that year. Similarly with the balance-sheet of 1913. The two affairs seem to me to be quite as distinct as where you have a band of dacoits cooperating with the same general purpose of plunder, who commit several dacoities at different places and at different times. I never heard it suggested that occurrences of that kind should be regarded as forming parts of one transaction, though three of such cases might be tried together on other grounds. Therefore it seems to me that the joinder of these charges was against the law that therefore there has not been a proper trial and that the appellants must be acquitted and discharged.

We then have to consider what is to follow. For my part I think it better that the proceedings should end here and now, and that they should not be revived I think so, amongst others, for these reasons. It is now an old story. The company has been wound up and has come to an end. The appellants have been subjected to a trial of considerable length and to a very long period of suspense between the trial and the hearing of the appeal, and they must have been put to very serious expense in connexion with the legal charges. That being so it seems to me that it would be oppressive

to have them tried over again unless this were a case of a very flagrant type.

As regards the charge for the year 1912, after hearing what has been said on behalf of the defence and giving close attention to the evidence, it seems to me doubtful whether the conviction would be sustained. When we came to ask the Advocate-General, who appears for the prosecution, whether he would elect, if further proceedings were taken to go on with that charge or with the one relating to the year 1913, he said that he would go on with the latter charge that is for the year 1913. So what we are concerned with now is the broad general facts relating to that charge. It is a charge under S. 282 of the new Companies Act, which makes the preparation of a false balance sheet in itself an offence. Prior to the enactment of that section the preparation of a false balance sheet in itself was not an offence. That is a matter which may very properly be taken into consideration. Then the evidence the judgment of the Magistrate and as I understand it, the theory of the prosecution do not so much suggest that we are dealing with fraudulent persons who have cheated their Directors or their share-holders, as with persons who have it may be presented the balance sheet with much concealment that ought to have been displayed, but who have done this for the purpose of enabling the company to survive as a working company, to give it another chance of tiding over years of difficulty and eventually reaching years of security. And I think the case as a whole suggests that this really was so and that the object of the accused—the appellants—was not the enrichment of themselves, but the benefit and survival of the company. Whether that be really the truth of the matter I cannot say, but it is a view of the case which presents itself very readily to the mind and which we are certainly justified in accepting as a working hypothesis for the time being. Those being the conditions then I think that it would indeed be rather oppressive if we were to direct that further proceedings should go on. So I think we should express that opinion and that our order should be simply that the appellants be acquitted and discharged.

**Shah, J.**—In view of the importance of the case I desire to state briefly the grounds upon which I agree with my learned brother. The two appellants in this case were tried jointly on five charges by the First Class Magistrate of Poona; and after a prolonged trial, the learned Magistrate convicted them of all the offences charged and sentenced them to different terms of imprisonment. The appellants preferred an appeal to the Court of Session at Poona; and that appeal has been transferred to this Court. At the outset I desire to express my agreement with the remarks of my learned brother as to the delay that has occurred in the hearing of this appeal, though in a large measure it is attributable to the exceptionally heavy record, and to the circumstance that it is an appeal from the judgment of a First Class Magistrate in a warrant case and not an appeal from the judgment of a Sessions Court, as is usually the case.

After arguing the appeal on the merits as to the set of charges connected with the balance sheet of 1912, the counsel for the appellants urged that the joinder of the charges in the present case was contrary to the provisions of the Criminal Procedure Code, and that the whole trial was illegal. We have heard the learned Advocate-General as to the joinder of the charges and the legality of the trial and as to the order to be made in the event of the trial being found to be illegal. The first four charges against the two appellants framed by the trial Court relate to the balance sheet for the year 1912, and the point of the charges is that the profit of Rs. 35,179 for the year 1912 is shown in that balance sheet dishonestly with a view to induce the Directors to recommend and the share-holders to sanction the declaration of a dividend, when in fact there was no profit, and further that the two accused dishonestly received their respective divilends in connexion with the shares held by them in this company and the commission which would be due to them under the articles of association on the profits shown in that balance sheet. That is the substance of the first four charges. It is not suggested that the joint trial of the accused in respect of these four charges would be open to any objection, if there were no further independent charge.

The further charge relates to the making of a false balance sheet for the year 1913 which is an offence punishable

under S. 282, Companies Act, 7 of 1913, the balance sheet having been submitted to the Directors and share-holders after 1st April 1914 when the Act came into force. The joint trial of the two accused in respect of all these charges can be justified only if the acts attributed to the appellants can be reasonably held to form part of the same transaction. Under Ss. 235 and 239, Criminal P. C., the charges that could be tried must arise out of acts committed in the same transaction or so connected together as to form the same transaction. I do not think that S. 234 of the Code has any application to the facts of this case. The trial Court has allowed the joinder of charges against the accused in spite of the objection raised on their behalf and the question now is whether the joinder is legal.

In my opinion the acts attributed to the accused in respect of the balance sheet of 1912 are quite distinct and separate from the acts attributed to them in respect of the balance sheet of 1913, and according to no possible meaning of the word "transaction," can it be said that these acts form part of the same transaction. The acts are quite separated in point of time; there is in my opinion no continuity of action. The acts attributed to the accused in respect of the balance sheet of 1912 relate to the declaration of profits for the year in the balance sheet, while the acts attributed to the accused in respect of the balance sheet of 1913 relate to various items, detailed in the charge, which bave practically no connexion with the profits of the year 1912 and the declaration of the dividend and the charging of the commission in respect of that year. The inquiry relating to the question of profits in the year 1912 would be quite distinct and essentially different in its scope from the inquiry which would have to be made with reference to the acts attributed to the accused in respect of the balance sheet of 1913. Lastly it cannot be said that there was any object common to these two sets of acts. As to the first set of charges the accused are said to have shown the profits during the year 1912 falsely in order to earn their commission and the dividends on the shares. As to the other charge the object is said to be to conceal the true condition of the company, in order to keep it going. Thus the objects are essentially different. The way in which the charge in respect of the balance sheet of 1913 has been explained by the learned Advocate-General with reference to the items of depreciation, reserve fund, and the unpaid dividend accounts illustrates to my mind clearly that the acts said to have been done with reference to the charge under S. 282, Companies Act are entirely distinct and have reference solely to the balance sheet of 1913.

It is true that the charge under S. 282, Companies Act as framed in the lower Court relate to many more items; and it may be that the general object of concealing the true condition of the company was common to the preparation of the balance sheets for various years including the years 1912 and 1913. That in fact is the only ground upon which it is suggested that the several acts may be treated as constituting the same transaction. It is argued that during all the years of stress and difficulty the agents of this company tried to underestimate the losses and to overestimate the profits of the company with a view to conceal the true state of the company. Assuming that to be the general purpose underlying the preparation of these balance sheets for many years, particularly the balance sheets for the years 1910 to 1913, I do not think that such a general purpose can afford any justification for treating the different acts attributed to the accused as forming part of the same transaction within the meaning of Ss. 235 and 239 of the Code. Thus the joinder of the charges is clearly contrary to the provisions of the Code: and it follows that the whole trial is illegal. The question then arises as to whether we should order a retrial of the accused. I am clearly of opinion that in the interests of justice no retrial is needed and that it would be proper to allow the proceedings to terminate at this stage.

The prosecution are to a certain extent responsible for the joint trial on all these charges. The original complaint contained allegations covering all the charges, and I do not find anything in the proceedings to show that the prosecution at any time attempted to make it clear to the trial Court that the joinder of charges could not well be justified. On the contrary the trial proceeded in spite of the objection raised by the defence.

Further the trial in this case has been much prolonged and as the voluminous, needlessly voluminous, record of the case shows, undoubtedly very expensive to both the parties. Besides the circumstances connected with the charge also suggest that there should be no further trial. The learned Advocate-General has pressed for a retrial in respect of the charge under S. 282, Companies Act relating to the balance sheet of 1913 and as he explained the charge no doubt the retrial would be much more limited in its scope than the trial which proceeded on the charge as framed in the lower Court. The charge under S. 282, Companies Act, as framed in the trial Court necessitated an inquiry into the accounts of the company ranging over a period from 1894 to 1913. It must be remembered that the acts attributed to the accused substantially relate to the year prior to the coming into force of the new Companies Act, and that the balance sheet is to a certain extent the result of the accumulated errors of the years arising out of a faulty method of keeping accounts and not the result of any dishonesty on the part of the accused. Treating the charge under S. 282, Companies Act as limited in the manner now suggested on behalf of the prosecution, I do not think that the interests of justice demand that there should be any further trial on that charge.

As regards the set of charges relating to the balance sheet of 1912 the learned Advocate-General has fairly conceded that there need be no retrial. I do not think that any useful purpose could be served by ordering any further proceedings in connexion with those charges. On these grounds I agree with the order proposed by my learned brother.

G.P./R.K. *Accused acquitted.*

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## A. I. R. 1919 Bombay 115

HEATON AND SHAH, JJ.

*Alimahmad Abdul Hussein* and *others* —Appellants.

v.

*Vadilal Devchand Parekh* — Respondent.

Second Appeal No. 917 of 1916, Decided on 18th March 1919, from decision of Asst. Judge, Ahmedabad, in Appeal No. 110 of 1915.

**Presidency Towns Insolvency Act (3 of 1909), S. 57—After-acquired property—Bona-fide transactions completed before official assignee taking possession are valid.**

Transaction in respect of all property moveable and immovable acquired by an insolvent after the order of adjudication with any person dealing with him bona fide and for value and completed before the intervention of the official assignee are valid. [P 118 C 2]

*Strangman, Munshi, G S Rao* and *T. T. Parekh*—for Appellants.

*Mehta* and *M. H. Vakil*—for Respondent.

**Shah, J.**—The facts material to the point arising in this second appeal after the remand are briefly these. On Tyabji Farzullabhai applied to the Court for the relief of Insolvent Debtors, Bombay, and the usual vesting order was made on 10th January 1887. Subsequently on the debtor's application a personal discharge subject to any further orders was allowed and in accordance with the practice that obtained then, a judgment for all the debts was entered against the insolvent in favour of the official assignee under S. 86, Insolvency Act (11 & 12 Vic. C. 21) on 17th August 1887. The insolvent did not obtain any final discharge under the Act, and in fact nothing was done in the matter of the insolvency up to his death in 1904 or up to November 1917 after his death. Owing to the non-production of the necessary papers the lower appellate Court had some doubt as to the existence of the vesting order and as to whether there was a final discharge of the insolvent. In the argument before us the facts as stated above have not been disputed, and the papers relating to this insolvency, which we have seen with the consent of the parties in order to avoid delay and further remand on points capable of being easily ascertained, support the statement. Tyabaji was therefore an undischarged insolvent from 1887 to the time of his death in 1904. In 1898 Tyabaji purchased a house at Kapadvanj and mortgaged it with possession on the same day (9th July 1898) to one Vajiraboo for Rs. 700 Babashahi and executed a second mortgage in favour of one Jamnadas on the same day. It is found by the lower appellate Court and not contested before us that the house was purchased by Tyabaji with the money borrowed from the two mortgagees.

Jamnadas filed Suit No. 93 of 1910 on his mortgage against the heirs of Tyabaji and obtained a decree in execution where-

of the house was sold through the Court subject to the first mortgage and purchased by the present plaintiff, Vadilal, on 12th September 1912. The plaintiff as auction-purchaser then filed the present suit against the defendants the heirs of Vajiraboo, for redemption of the first mortgage. The trial Court allowed the plaintiff's claim. The lower appellate Court confirmed the decree. On appeal to this Court certain issues were sent down for findings in connexion with the insolvency of Tyabaji. Before the remand the defendants purchased the right title and interest of the official assignee in November 1917. On these facts it is urged on behalf of the defendants that the plaintiff did not purchase Tyabji's interest at the Court sale as it was vested in the official assignee, and that they having purchased that interest from the official assignee, they are entitled and willing to redeem the mortgage in favour of Jamnadas which is vested in the plaintiff. It is conceded on behalf of the defendants that this mortgage now vested in the plaintiff is binding upon the official assignee and that the plaintiff is entitled to be redeemed.

The plaintiff contends that the after-acquired property of the insolvent cannot vest in the official assignee until he intervenes and that the Court-sale which took place long before his intervention is binding upon him and conveys to the plaintiff the whole interest of Tyabaji and the second mortgagee subject, of course, to the first mortgage. It may be mentioned that the point now made on behalf of the defendants was not urged in the trial Court, and that what is described as the intervention of the official assignee really came into existence long after the decision of the lower appellate Court. It involves practically a re-consideration of the rights of the parties on a new basis. This Court has however allowed the point to be raised at the time of the remand, and it is clear that the appellants are entitled to have their rights determined on the facts now ascertained. It must be taken for the purpose of this appeal that the transactions of the insolvent with Jamnadas and Vajiraboo were bona fide and for value, that Jamnadas sued the heirs of Tyabaji in complete ignorance of the insolvency proceedings, and that the subsequent proceedings on the suit resulting in the Court-sale were bona fide throughout. It is urged however that under S. 7, Insolvency Act, the interest of Tyabaji was vested in the official assignee. No doubt that section applies to after-acquired property of the insolvent. But as pointed out in *Kerakoose* v. *Brooks* (1), the right of the official assignee is subject to the qualification that "if the insolvent has acquired property subject to liens and obligations, then any property taken by the assignee under that state of things is taken subject to those charges and equities which affect the property in the hands of the insolvent."

It is not necessary to refer to the other qualification mentioned by their Lordships of the Privy Council. It is conceded in the present case that the official assignee would take the property subject to the two mortgages effected by Tyabaji in 1898; and in view of the fact that Tyabaji purchased the property with the moneys received from the two mortgagees, it is indisputeable that the insolvent acquired the property subject to those charges. It is argued however that the equity of redemption was vested in the official assignee, and that the suit by Jamnadas was not properly constituted as the official assignee was not a party to it. It is urged by way of reply that the suit was properly constituted, that the sale in execution of the decree is binding upon the official assignee as a bona fide transaction for value, and the equity of redemption would not vest in the assignee before his intervention according to the rule in *Cohen* v. *Mitchel* (2). If the mortgage in favour of Jamnadas is good as against the official assignee, I do not see how the suit of 1910 can be said to be defective in any way. If Tyabaji or his heirs could have sued Jamnadas to redeem the mortgage in his favour as the official assignee had not intervened, Jamnadas could sue the heirs of Tyabaji to enforce his mortgage. It is difficult to see what else Jamnadas could have done to enforce his mortgage, as he was ignorant of Tyabaji's insolvency and as the official assignee had not intervened. The suit and all the subsequent proceedings appear to me to be quite proper on the assumption that at the time it was open to Tyabaji or his heirs to deal with the equity of redemption. The Court purchaser could not be in any worse position than a bona fide purchaser for value under similar

(1) [1859-61] 8 M. I. A. 339=1 Sar. 778 (P.C.).
(2) [1890] 25 Q. B. D. 262.

circumstances from the insolvent or his heirs before the intervention of the Official Assignee, and the learned counsel for the appellants has not suggested that he should be in any worse position. It is urged however that a bona fide purchaser for value of the after-acquired immovable property cannot get a good title against the Official Assignee even though the latter has not intervened, as the equity of redemption is vested in the Official Assignee. The plaintiff seeks to meet this contention by relying upon the rule in *Cohen* v. *Mitchel* (2), which is stated by the Court of appeal in these terms :

" Until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him bona fide and for value in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee. "

This rule is stated in perfectly general terms and there is no suggestion in the rule itself that it applies only to personal and not to real property. If this rule applies to after-acquired immovable property in India, the appellants' contention must fail. The question therefore is whether it applies to such immovable property.

It will be convenient to state briefly how the rule has been applied in England. It has been held that the rule does not apply to real estate: see *New Land Development Association and Gray, In re* (3). In this case the decision of Chitty, J., was upheld by the Court of appeal on a different ground, but in the course of argument the Lords Justices expressed a strong opinion in favour of limiting the application of the rule to personal estate. In *Clarke, In re, Beardmore, Ex parte* (4), Davey, L. J., referred to the same rule with approval without any reference to the limitation as to the nature of the after-acquired property. In 1895 Chitty, J., refused to attempt to introduce any limitation in the rule beyond that stated by him in the case of *New Land Development Association and Gray, In re* (3) and applied the rule to leasehold property: see *Clayton & Barclay's Contract, In re* (5). In *Official Receiver* v. *Cooke* (6) Neville, J., felt himself bound to treat the rule as applicable only to personal estate including leaseholds. The same learned Judge applied it to the after-acquired real estate,

(3) [1892] 2 Ch. D. 138.
(4) [1894] 2 Q. B. 393.
(5) [1895] 2 Ch. D. 212.
(6) [1906] 2 Ch. D. 661.

which undischarged bankrupts purchased as partners for partnership purposes and sold and conveyed to bona fide purchasers for value before the trustee intervened in the case of *Kent County Gas Light and Coke Co. Ltd., In re* (7). The rule in *Cohen* v. *Mitchell* (2) received a statutory recognition in S. 11, Bankruptcy and Deeds of Arrangement Act, 1913 (3 and 4 Geo. V, c. 34) and later in S. 47, sub-S. (1), Bankruptcy Act, 1914 (4 and 5 Geo. V, c. 59). In the recent case of *Hill* v. *Settle* (8) Lord Cozens Hardy, M. R., after referring to *Cohen* v. *Mitchell* (2) and the Bankruptcy Act of 1914, has observed that "the legislature has plainly recognized the validity and effect of that which is to be found in what is, no doubt, Judge-made law as expressed in series of decisions extending over some 200 years." I have not thought it necessary to refer to the decisions prior to *Cohen* v. *Mitchell* (2).

Thus it is clear that the rule has always been recognized as a beneficent rule, that though for some years the view that it did not apply to real property prevailed, the tendency was in favour of extending its application and that finally the legislature has fully recognized the rule both as to the real and personal property, and has applied it retrospectively to all transactions completed before April 1914, subject to the condition that the trustee has intervened before that date. In India long before the decision in *Cohen* v. *Mitchell* (2) it was held in *Kristocomul Mitter* v. *Puresh Chunder Deb* (9) that so long as the Official Assignee had not interfered, an insolvent who had not obtained his final discharge had power with respect to after-acquired property to buy and sell and give discharge and do all other acts which he could have done before his insolvency. The property in that suit was immovable property. In *Fatimabibi* v. *Fatimabibi* (10) it was held by Parsons, J., that the Official Assignee was not a necessary party to a suit by the heirs of the deceased undischarged insolvent for a share in the after-acquired property, and that such property vested in the insolvent subject to the right of the Official Assignee to intervene and to claim the property. There is no refe-

(7) [1909] 2 Ch. D. 195.
(8) [1917] 1 Ch. 319.
(9) [1882] 8 Cal. 556.
(10) [1892] 16 Bom. 452.

rence to the rule in *Cohen* v. *Mitchell* (2) in the judgment. The Madras High Court declined to apply the rule to dealings by the insolvent with immovable property: see *Rowlandson* v. *Champion* (11). It may be noted that Collins, C. J., had in the first instance applied the rule to immovable property. In appeal however the learned Judges reversed the order of the Chief Justice and their judgments show that their decision was influenced by the case of *New Land Development Association and Gray, In re* (3), already referred to. Later on in *Sriramulu Naidu* v. *Andalammal* (12) the decision in *Fatimabibi* v. *Fatimabibi* (10) was approved, and the learned Judges were content to distinguish *Rowlandson's* case (11) on the ground that there was no question of contract or transfer by the insolvent relating to his after-acquired immovable property.

The rule in *Cohen* v. *Mitchell* (2) has been referred to in two decisions of this Court. In *Naoroji Nusserwanji Thoonthi* v. *Kazi Sidick Mirza* (13) it was considered in relation to a special set of facts, and there was no occasion to consider it with reference to the point arising in this case. At p. 654 of the report it is pointed out that the rule in *Cohen* v. *Mitchell* (2) could not apply to the agreement with which the Court had to deal in that case. In *Macleod* v. *B. B. & C. I. Ry. Co.* (14) it was urged that the doctrine of *Cohen* v. *Mitchell* (2) was limited to those cases where the insolvent's after-acquired property had been the outcome of subsequent trade. The appeal was ultimately decided on a different ground, and the question of law was left undecided. But after referring to certain cases Jenkins, C. J., observed as follows: "In the face of this I hesitate to say that the doctrine on which *Cohen* v. *Mitchell* (2) rests is limited to subsequent acquisitions in trade, though I do not say it may not be the correct view. In this connexion I have not overlooked the decision in *Kerakoose* v. *Brooks* (1), but I am not clear that their Lordships intended there to lay down an exhaustive statement of the law as to after-acquired property except so far as was necessary for the purposes of the case then before them." I do not think that there can be any doubt as to the trend of the learned Chief Justice's opinion with reference to the scope of the doctrine on which *Cohen* v. *Mitchell* (2) is based. At any rate there is nothing in the judgment which is opposed to the view that the rule applies to all the after-acquired property, moveable and immovable, of the insolvent.

On a careful consideration of all the decisions above referred to, it seems to me that the rule in *Cohen* v. *Mitchell* (2) can be, and ought to be, applied to all the property, moveable and immovable, acquired by the bankrupt after the adjudication order, provided that the transaction by the bankrupt is bona fide and for value and is completed before the intervention of the Official Assignee. In other words, I do not think that the nature of the after-acquired property forms any essential part of the rule: what is essential is that the transactions with reference to the property with third parties must be bona fide and for value and that they must be entered into before the Official Assignee intervenes. The reason of the rule does not compel the recognition of any restriction as to the nature of the property in its application; and I do not think that the distinction between real and personal property made in England in applying the rule can be properly applied to immovable and moveable property in India. The statement of the law as to after-acquired property in *Keerakoose* v. *Brooks* (1) has been held not to be exhaustive in Indian decisions; and the weight of judicial opinion in India seems to favour the view that the rule in *Cohen* v. *Mitchell* (2) applies to the after-acquired property, moveable as well as immovable. With due respect for the opinion of the Madras High Court to the contrary in *Rowlandson's* case (11), I think that the rule can be properly applied to all after-acquired property, whether moveable or immovable. Thus in the present case tho property was effectively disposed of before the Official Assignee can be said to have intervened. The conveyance in favour of the appellants by the Official Assignee cannot help them, as the Official Assignee had nothing to convey at the date.

For the purpose of this case I have assumed that the Official Assignee intervened when he sold his right, title and

(11) [1894] 17 Mad. 21.
(12) [1907] 30 Mad. 145.
(13) [1896] 20 Bom. 636.
(14) [1905] 7 Bom. L. R. 618

interest to the appellants in November 1917. I am not sure that that amounts to an intervention on the part of the Official Assignee as is required to vest the property in him. It is not necessary for the purpose of this case to examine the point further, as the transaction was completed long before the alleged intervention; and I express no opinion on the question whether the intervention such as we have here is effective. I also refrain from expressing any opinion as to whether under the circumstances the Official Assignee should have attempted to enforce the judgment under S. 86, Insolvency Act or should have himself intervened in these proceedings, if he thought that he had any right to the property in suit, instead of allowing his intervention to be pleaded through the appellants. The result is that the appeal is dismissed and the decree of the lower appellate Court confirmed with costs.

**Heaton, J.** — My learned brother's judgment shows that the only point of interest in the case is whether S. 7, Insolvency Act, 11 and 12 Vic., c. 21, is to be literally construed or not. If it is, the words "do vest in the Official Assignee" must be given their full ordinary meaning. If that be done, then the entire interest in property apparently acquired by an undischarged insolvent belongs to the Official Assignee. Many years' experience both in India and England has demonstrated that this would be a most undesirable position. The words have not been literally construed either in India or in England. It is therefore established that there is a measure of freedom allowed to us in construing this section. That being so, I agree with the method of applying the section to the facts of this case adopted by my learned brother. I agree that the appeal should be dismissed with costs.

G.P./R.K. *Appeal dismissed.*

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## A. I. R. 1919 Bombay 119

MARTEN, J.

*Shirinbai*, In re.

Ordinary Original Extraordinary Civil case Decided on 22nd August 1908.

**Trusts Act (1882), Ss. 40, 20 and 36—Trustees having no express power of sale by instrument of trust—Neither S. 36 nor S. 40 confers such power—Court can however sanction sale under its general administrative jurisdiction — Trusts, Rights of Trustee.**

Neither S. 36 nor S. 40, Trusts Act, confers a power on trustees of land who have no express power of sale in the instrument creating the trust to sell the land. [P 121 C 1]

Where however in the administration or management of a trust estate by the trustees there arises an emergency or a state of circumstances which it may reasonably be supposed was not foreseen or anticipated by the author of the trust and is unprovided for by the trust instrument, and which renders it desirable in the interests of the beneficiaries that certain acts should be done by the trustees which they themselves have no power to do and to which the consent of all the beneficiaries cannot be obtained by reason of some not being sui juris or not yet in existence, the Court will exercise its general administrative jurisdiction by sanctioning, on behalf of all parties interested, those acts being done by the trustees. [P 121 C 1]

The trustees and beneficiaries under a trust applied to the Court to sanction a sale of the trust property which was situated in the city of Bombay. It was found that the property was very old, was in imminent need of repairs, was entirely defective as regards sanitary conveniences and was liable to a set-back which would cause a serious depreciation in its value. It was also found that the beneficiaries were unable to effect repairs and could not comply with the Municipal requirements which might be made in connexion with the property:

*Held*: that this was a case of emergency in which the sale should be sanctioned by the Court in the exercise of its extraordinary jurisdiction. [P 121 C 1,2]

*Kanga*—for Petitioners.

**Judgment.**—This is an adjourned petition which raises the question whether trustees of land who have no express power of sale in the instrument creating the trust have power to sell that land either with or without the consent of the Court. The parties concerned are all Parsis. The trust instrument in question is a settlement made on 11th February 1898. The settlor was one Bai Galbai since deceased and the trustees were her two daughters, Shirinbai and Ratanbai, the present petitioners. It was a voluntary settlement, and the only property settled was a certain immovable property in Meadows Street, Bombay, mentioned in the schedule. The trusts were for the settlor for life with remainder as to one moiety for Ratanbai for life with remainder, to use the exact words of the instrument,

"for the issue of the body of the said Ratanbai in the shares prescribed by law as if the said Ratanbai had died possessed of the said share intestate leaving such issue only as her right heirs and in default of such issue upon the

trusts hereinafter declared in regard to the other half of the said premises."

The other moiety went to the other daughter Shirinbai for life with a limitation over to her issue similar to that contained as regards Ratanbai's moiety. There is an ultimate gift over of all the property to charity in case there should be no

"person living entitled to take the said premises under the trusts hereinbefore declared."

The petitioner Ratanbai is forty-seven and unmarried. Shirinbai, I am told, is fifty-two and has six children, viz., two daughters and four sons, all of whom consent to the proposed sale. Stopping for a moment at the trust I have read I do not propose to say what is the meaning of the trust

"for the issue of the body of the said Ratanbai in the shares prescribed by law"

and so on. I think for the purposes of this case it is sufficient to say that it is not clear that the grandchildren of Shirinbai—or for the matter of that of Ratanbai if she married and had children —might not take in certain events, e. g,, if the parents of those grandchildren predeceased the tenant for life, Shirinbai or Ratanbai as the case might be. Accordingly I do not think it can be said with certainty that I have now before me all beneficiaries, who can in any possible circumstances be entitled to the property for it is possible that when the settlement comes finally to be construed and the trusts wound up some child or grandchild, at the present moment unborn, may be entitled to a share in the property.

The case therefore cannot be disposed of on the lines that the trustees only propose to do something with the consent of all the beneficiaries. Now what the parties wish to do is this. For reasons which I will mention later, they wish to sell the property and have accordingly entered into an agreement for sale at what is considered to be an advantageous price. Very naturally the purchaser declined to accept the title without the sanction of the Court: and accordingly the trustees have presented the present petition asking for that sanction. All the children of Shirinbai have given their written consent to the sale. The first point that arises is the question of jurisdiction that I have referred to, viz., whether in a case such as I have before me, the trustees have any power to sell the land and if not, whether the Court has any jurisdiction to give them that power. Mr. Kanga for the petitioners has referred me to S. 40, Trust Act, 1882. That section gives power to trustees to vary investments and argument is that the trust land is an investment which the trustees may vary and for that purpose may sell. If that argument is correct all trustees would have power to sell land and no leave of the Court would be necessary. S. 40 runs as follows:

"A trustee may, at his discretion, call in any trust property invested in any security and invest the same on any of the securities mentioned or referred to in S. 20, and from time to time vary any such investments for others of the same nature."

Now, I think anybody reading those words must be struck by their inaptitude to deal with the case of the sale of land. To say that a sale of land settled by the settlement itself is a calling in of trust property invested in any security is hardly, I think what the legislature intended when they drafted S. 40. To start with, you do not speak of "calling in land." Nor is it usual or correct to speak of land as "property invested in any security." Of course a mortgage of land is referred to as a real security but a power to invest in real securities as in the English Trustees Act, 1893, Ss. 1 (b) and 5, will not give power to invest in the purchase of land but only in the mortgage of land. This illustrates the importance of the word "security" S. 40, Indian Trusts Act. I do not think anyother section of the Indian Trusts Act that have been referred to has much or any bearing on this point, except possibly Ss. 20 and 36. S. 20 gives power to invest in certain securities and the securities mentioned are those ordinarily described as securities, namely, debentures, mortgages and so on. I cannot help thinking that that was the sort of security that the legislature had in mind when they referred in S. 40 to calling in trust property in any "security."

Section 36 provides that

" . . . a trustee may do all acts which are reasonable and proper for the realization, protection or benefit of the trust property, and for the protection or support of a beneficiary who is not competent to contract."

Stress was laid on the word "realization" and it was said that this authorized a sale, particularly if it was clearly for the benefit of the beneficiaries. However if the case had depended on Ss. 40 and

36 alone, I should have felt the greatest difficulty in holding that there was any general power for trustees to sell land under both or either of these sections or that the Court had any power to sanction such a sale. There does not appear to be any Indian reported case on the point, but Mr. Kanga was good enough to mention an unreported case he had before my brother Macleod, J., where, I understand, the Court felt very much the same difficulty as I do about the meaning of S. 40 and in that particular case refused to sanction the sale.

But, I think, in the present case it is unnecessary for me finally to decide whether the trustees have any power under S. 40 or S. 36, because I think, this particular case may be decided on another ground, namely, under the extraordinary jurisdiction of the Court which it can exercise in certain cases of what I may call "emergency." I think that class of jurisdiction is exemplified at his highest in *In re New* (1) a decision of the English Court of appeal, the headnote of which runs as follows:

"Where in the administration or management of a trust estate by the trustees especially where the estate consists of a business or of shares in a mercantlie company, there arises an emergency or a state of circumstances which it may reasonably be supposed was not foreseen or anticipated by the author of the trust and is unprovided for by the trust instrument, and which renders it desirable and perhaps even essential in the interests of the beneficiaries, that certain acts should be done by the trustees which they themselves have no power to do, and to which the consent of all the beneficiaries cannot be obtained by reason of some not being sui juris or not yet in existence the Court will exercise its general administrative jurisdiction by sanctioning on behalf of all parties interessted those acts being done by the trustees . . .

I will only say by way of warning that as pointed out in that case, this jurisdiction is of an extremely delicate character and has to be exercised with the greatest caution. The case should be read at the same time with *In re Tollemache* (2), where Cozens Hardy, L. J. as he then was said at p. 956:

"I will only add that, in my opinion *In re New* (1) constitutes the highwater mark of the exercise by the Court of its extraordinary jurisdiction in relation to trusts."

"Now, have I got here a case of an emergency such as is contemplated in *In re New* (1)? So far I have not dealt with the facts which have led to the proposed sale. This is not a case where the parties from some mere caprice, or from an ordinary desire to change of investments, or to increase their income, are desirous of settling the property. The facts are that this property is at the corner of two streets and is liable to a set back and that if that set-back arose, which would happen on any occasion when it might be necessary to go to the Municipality for their approval of plans, the property would be very seriously depreciated. Then, further, the property is an extremely old one and repairs in the near future are undoubtedly required. Amongst other things it is entirely defective as regards sanitary conveniences and any moment the trustees might be served with a sanitary notice from the Municipality. This notice would be extremely difficult to comply with and would probably result in the set-back being enforced. I will not go into all the details of the affidavit of the Engineer, Mr. Nowroji Hormusji Katrak, but he sums up the situation in the last paragraph in which he says :

" In these circumstances I consider it most desirable that the property should now be sold for Rs. 33,000 and if it is not sold for Rupees 33,000, I should consider that the property is allowed to be ruined and that the beneficiaries' interest would be very adversely affected partly on account of their disability to do the repairs within the regular lines of the streets and partly on account of the inevitable monetary loss."

That being so, I think there is an emergency here within the meaning of *In re New* (1). Certainly the settlor here never contemplated the possibility of a set-back, nor of these Municipal requirements and the possible disastrous effect they might have on the beneficiaries under the trust instrument. I think really this is a case where it would be almost pedantic on my part to say that the letter of the trust must be kept to and the spirit disregarded and that as it is land which is settled, land it must remain. I accordingly consider that I may properly exercise in this present case the extraordinary jurisdiction which I have and that accordingly the sale ought to be sanctioned.

I notice that the two trustees are the two tenants for life, and usually I do not think that is a very desirable trusteeship. It is true that they were the trustees appointed by the settlor herself, but she

(1) [1901] 2 Ch 534.
(2) [1903] 1 Ch. 457.

S. N. DAR, B. A. LL. B.,

settled land and now the trust property may consist of easily convertible investments. If therefore there is any desire by the children of Shirinbai that a third trustee should be appointed, I think it would be a proper case to apply in Chambers to have that third trustee appointed. But, as far as the present application is concerned, I am not going to make that a term of my order. As regards the re-investment of the sale proceeds, I think that the trustees will have power to invest the proceeds in any investment for the time being authorized by law for the investment of the trust funds and will have power to vary such investment. I also think that I ought to give liberty to the trustees to apply to re-invest the proceeds in the purchase of land, if so advised. It is perhaps unnecessary to say that the sale proceeds will devolve in the same way as the land would have done, but, if desired, a provision to this effect can be inserted in the order as was done in the order on the files of this Court made by Sir Lawrence Jenkins in *In re Manilal Hurgovan* (3), where he dealt with the extraordinary jurisdiction of the Court to sanction the sale of a minor's interest in Hindu joint family property. Accordingly the order will be as prayed, but the petitioners will have their costs of the petition out of the trust estate between solicitor and client, and, having regard to my order and the letter of consent of 2nd August 1918, there will be no necessity for the children of Shirinbai to join in the conveyance. The title of the petition and order will be amended by adding "and extraordinary civil jurisdiction" after "ordinary original civil jurisdiction," and there will be liberty to apply as to re-investing in land and generally.

G.P./R.K. *Order accordingly.*

(3) [1901] 25 Bom. 353.

## A. I. R. 1919 Bombay 122

SCOTT, C. J. AND SHAH, J.

*Krishnaji Ganesh Kulkarni*—Plaintiff—Appellant.

v.

*Secy. of State* and *another*—Defendants—Respondents.

First Appeal No. 219 of 1913, Decided on 3rd December 1918, against decision of Dist. Judge, Dharwar, in Suit No. 22 of 1912.

**Civil P. C. (1908), S. 86—Kurundwad jahagirdars are Ruling Chiefs within S. 86.**

Kurundwad jahagidars are Ruling Chiefs and cannot be sued without the consent of the Governar-General. [P 126 C 1]

*Dhurandhar* and *A. J. Desai*—for Appellant.

*S. S. Patkar*, *Coyajee* and *K. H. Kelkar*—for Respondents.

**Scott, C. J.**—The plaintiff in this case sued for a declaration that he was a British subject, alleging that he was a resident of Lohakur in the Pachapur Taluka in Dharwar Subha, a village which was in the Peshwa's dominions until 1818, when it was annexed by the British Government and included in the District or Subba of Dharwar. He alleges that, on 3rd April 1820 the revenues of the village were assigned to the then Chief of Kurundwad (the ancestor of defendant 2), but the village itself remained in British possession through a misconception of the grant or through oversight or negligence and breach of duty and without any reasonable cause whatever. British authorities ceased to exercise their supreme authority over the village, a course which was blindly followed until now with the result that the Chief of Kurundwad began to exercise sovereign control over the village to the detriment of the plaintiff's rights and privileges of a British subject. The plaintiff had asserted these rights by asking unsuccessfully for a tagai loan from the Collector of Dharwar and the Commissioner, Southern Division, and for a license for gunpowder and fuses from the District Magistrate of Dharwar. On both occasions the Government of Bombay upheld the decisions of the local officers who had refused the request on the ground that Lohakur was not in the Dharwar District. The Collector also declined to inquire into the rights of the British Government over Lohakur. Hence the present suit for a declaration that Lohakur being situate in the District of Dharwar, the plaintiff as a resident and a kadim watandar and Inamdar thereof is a British subject. He also prays for a perpetual injunction restraining defendant 2 from doing any act of interfering with such rights and privileges of the plaintiff.

The suit is instituted against the Secretary of State for India in Council and the Ruling Chief of Kurundwad. The Patwardhans, the family to which the

defendant 2 belongs, are a Brahmin family which rose to power in the time of the Peshwas and had attained an influence in the Southern Mahratha country which led to a jealous interference on the part of the Peshwas prior to 1812. The Patwardhans in various branches hold large jahagirs on condition of supplying troops for the Mahratha Confederacy, and in 1812 the differences arising between them and the Peshwas resulted in the intervention of the East India Company by whose influence articles of agreement were entered into in 1812 between the Poona Government and the Patwardhans.

In 1817 the Peshwas' Government at Poona came to an end with the battle of Kirkee and the East India Company assumed control of the territories theretofore subject to the Peshwas. The territorial acquisitions of the East India Company resulting from the fall of the Peshwas extended southwards beyond Dharwar, and in 1818 as an administrative measure the application of the Regulations theretofore in force within the territories of the East India Company was extended by General Munro for the purpose of governing the territory roundabout Dharwar which he was occupying, but there was no legislative extension of statutory enactments to the Southern Mahratha country until Regulation 7 of 1830. At first the British District in the Southern Mahratha country was associated with the name of Dharwar, but subsequently the Dharwar Zillah was broken up into Dharwar and Belgaum. But there is no evidence in the case that the village of Lohakur, of which the plaintiff claims to be a kadim inamdar, holding a Kulkarniki Vatan, was included in the Belgaum District, as carved out from the Dharwar District, or in the Dharwar District, as originally administered by the East India Company. The village is situated towards the north of the Belgaum District ,as it now exists, and is very close to Shedbal. Shedbal was a jahageer given by the Peshwa to Ganpatrao, one of the Kurundwad family, in 1812. It appears now to have lapsed to the British Government. Lohakur lies slightly to the north of Shedbal, and there is no evidence that it was ever administered by the British Government. Its history is connected with the history of the Kurundwad family in its relations with the British Government immediately after the fall of the Peshwas.

In West's Memoir of the States of the Southern Mahratha Country at p. 38 is to be found an extract from the despatch of the Secretary to the Governor-General, dated 14th July 1818, to Mr. Mountstuart Elphinstone expressing the views entertained by Lord Hastings as to the general policy to be adopted towards the Southern Mahratha Chiefs, in which it is stated that his Lordship has no design of introducing into the territories of the jahagidars our system of administration in any of its branches. His Lordship conceives the British Government however to be entitled to require the establishment by the jahagirdars themselves of such an internal course of management as by maintaining the peace of their own districts shall prevent them from becomiug dangerous to the tranquillity of the neighbouring possessions of the Government. The terms proposed by the East India Company are set out on p. 142 and the following pages of West's Memoir Appendix. Cl. 5 of those terms states that "the confirmation, under the guarantee of the British Government, of all lands held under the authority of the Peshwa, was irrevocably pledged to you, as long as you should continue to perform the duties of allegiance, fidelity and attachment. A similar clause is introduced into the present agreement." The first part of this clause referred to in the agreement of 1812 arranged by the East India Company between the Peshwa and the Patwardhans, and on p. 146 of the Appendix the 7th term of the agreement proposed on behalf of the Governor-General is: "You are responsible for the good government of your jahageers and for the protection of the peoples. As long as the administration of justice and of police shall be well conducted, the Government will not interfere in the management."

The terms finally granted by the East India Company are to be found on p. 280, Vol. 7 of Aitchison's Treaties Art. 9 is: "You will attend to the prosperity of the raiyats of your jahageer, to the strict administration of the justice and the effectual suppression of robberies, murders, arsons and other crimes. The Government will not enquire into every complaint that may arise in your Jahageer." Article 11 is: "If any offenders from your jaha-

geer lands shall come into those of the Government, you will represent the affair, and they shall on inquiry be delivered up to you." That agreement of treaty was signed at Gulgulee on the Krishna on 6th June 1819. On the following day Mr. Mount Stuart Elphinstone addressed the Secretary to the Governor-General a letter in which he quotes from a document of 1818 as explaining the principle of the agreement which had just been signed with the Patwardhans. It runs as follows; (see West's Memoir, Appendix. p. 1730: "These jahageerdars must, by our agreement with them, continue to be governed according to the terms of Pandharpur, which are founded on the ancient customs of the Mahratha Empire. They must therefore have the entire management of their own jahageers, including the power of life and death, and must not be interfered with by Government unless in case of very flagrant abuse of power or long continuance of gross misgovernment." In para. 12 of the same letter Mr. Elphinstone observes: "The only general rules that I would suggest for the future regarding the Chiefs are that no alterations regarding the police, the customs, the mints, and similar branches of the administration of the Jahageers which may be thought to affect the interests of Government may be attempted without the free consent of the jahageerdars," and in para. 12 as well as in para. 13 and other paragraphs of his letter he refers repeatedly to the jahageerdars as the Chiefs. So far then as the jahageers of the Kurundwad family are concerned it is quite evident that sovereign power and full and complete jurisdiction, civil and criminal in their territories, was conferred upon them by the British Government by the settlement of 1819.

The village of Lohakur, which, as I have said, is not indicated in any document referred to in this case as forming part of the British territory known as the Subha of Dharwar appears to have been ceded by the East India Company to the jahageerdar according to the arrangements which were maturing during the years 1818 and 1819. It appears that two villages of Sampgaum and Bagewadi which had belonged to the Kurundwad family had been seized by another Chief, the Chief of Kittur, and had not been returned by him. In a report by General Munro to Mr. Mount Stuart Elphinstone on 28th August 1818, cited at pp. 36 and 37 of West's Memoir, it is stated: "The Patwardhans are the only great jahageerdars with whom an arrangement has not yet been made; but as they are to receive and not to give, no difficulty is likely to be met with beyond what may arise from their discussions among themselves respecting their several shares of the additional allowances in money and land which may be granted by Government. I have not stated to their vakeels the amount proposed to be given, but they are desirous that, whatever it may be, the division should be left to be made among themselves. The Tasgaum, Chinchnee and Kurundwad Chiefs, from the disposition they showed at an early period to quit the Peshwa, are entitled to greater proportion than the others, and it will therefore be necessary that we make the distribution, unless they themselves express a desire that it should be made without our interference. Two lacs of rupees will, I think, be sufficient to satisfy all their expectations. This sum will be made up by a remission of the daishmook fees paid to the Sirkar, by a transfer of such Sirkar villages as are insulated among the lands of the Patwardhans, and by making over a part of Rastia's resumed Jahageer on the north bank of the Kristna."

On 16th August 1819 Mr. Mount Stuart Elphinstone wrote to Mr. W. Chaplin acquainting him with the arrangement which he thought most expedient for completing the grant of land of which hopes had been held out so long to the Patwardhans. The land ought, he conceived, to be granted as personal Tainat, and the amount to be awarded in the shape of land to Keshavrao of Kurundwad was stated to be Rs. 30,000: See West's Memoir, App. p. 184. This was a reduction from the sum originally proposed to be awarded to Keshavrao of Kurundwad in the shape of land; See p. 147 of West's Appendix, where Keshavrao of Kurundwad was set down as to receive Rs. 40,000 including indemnity for Sampgaum and Bagewadi, the two villages which had been seized by the Chief of Kittur. In his letter of 16th August 1819, Cl. 7 (West's Memoir, App. p. 185), Mr. Elphinstone said: "The grant of Rs. 30,000 to Keshavrao and Rs. 20,000 to Gunpat Rao Konair is a compensation for Sampgaum and Bagewadi, to which the family

is fairly entitled. Rs. 10,000 additional is granted to Keshav Rao as the elder branch, who has lost considerably by the partition to which in strictness Ganpatrao had no claim, although the Peshwa's sanad is now a bar to any question of his title (that refers to the partition under which Shedbal was given by the Peshwa to Ganpatrao in 1812). It may be stated to Ganpatrao that as Sampgaum and Bagewadi were never given up to him by the Peshwa, it would perhaps be strict justice to leave these districts with Keshavrao; that in granting him a share therefore the Government feels itself compelled to make a compensation to Keshavrao by a grant of Rs. 10,000 tainat."

In clause 8 it is said: "These grants ought, of course, to be made in such a manner as to consolidate the jahageers of the Patwardhans. It is particularly desirable that their lands should be as little mixed as possible with those of the Raja of Satara, and any villages you may find it necessary to give up for that purpose can be made up by giving villages to the Raja in the sequestrated jahageers of Rastia and Gokla." The only documents forthcoming which relate explicitly to the village of Lohakur are Exs. 25, 26 and 27. Ex. 25 is a statement of acount showing how the Rs. 30,000 is to be made up by the grant of land to Keshavrao. It is dated 8th January 1820, and one of the items is Rs. 5,527-6-0 for "detached villages' or as General Munro had called them, "insulated villages", in the Taluka of Pachapur, in the principal division of which one is Lohakur yielding a revenue, gross, of Rs. 912-13-0. The Yadi concludes with the words that "the release deeds of those villages may be forwarded." The account was revised on 3rd April 1820 by the Yadi, Ex. 26, and there was a further Yadi revising the account in respect of the village of Lohakur in the same year which is exhibited as No 27. We have not got the release deeds of the village contemplated in Ex. 25. It is, however certain that the Kurundwad Chiefs of the senior branch descended from Keshavrao have administered the Lohakur village for close upon a hundred years as part of his estate or jahageer or State, whichever expression may be deemed most suitable, and they have administered it as sovereign Chiefs. Their sovereignty has been recognized by an agreement with the Government of India in the year 1887: (see p. 223 of Aitchison's Treaties, Vol. 7), whereby the Kurundwad State ceded to the British Government full jurisdiction, short of sovereign rights, over "the lands within the State then occupied, or which may thereafter be occupied, by the railways comprised in the Southern Mahratta Railway system." As indicative of the status of the Patwardhan jahageerdars since the taking over of the territories of the East India Company by the Crown, I may refer to the Adoption Sanad granted to the Patwardhans in 1862, p. 285 of Aitchison, Vol. 7, which states that "Her Majesty being desirous that the Governments of the several Princes and Chiefs of India who now govern their own territories should be perpetuated, and that the representation and dignity of their houses should be continued; in fulfilment of this desire this sanad is given to you to convey to you the assurance that, on failure of natural heirs, the British Government will recognize and confirm any adoption of a successor made by yourself or by any future Chief of your State that may be in accordance with Hindu law and the customs of your race. Be assured that nothing shall disturb the engagement thus made to you so long as your house is loyal to the Crown and faithful to the conditions of the treaties, grants or engagements which record its obligations to the British Government."

So much for the history of the Kurundwad State and the connexion of the village of Lohakur with that State. It is contended on behalf of the plaintiff that although the East India Company may have thought that it was ceding the village of Lohakur to the Kurundwad State, it had no power to cede territory without the sanction of Parliament, and that Parliament's sanction was not obtained, and therefore the cession is of no avail and presumably the argument would be that there is a resultant return to the British Government of the village of Lohakur, and it must therefore be taken to be part of the Dharwar Collectorate for the purposes of the suit, although the collectorate of Belgaum intervenes between Lohakur and Dharwar. The argument is founded upon the dictum in *Damodar Gordhan* v. *Ganesh Devram* (1) which was dissented from or disapproved

(1) [1873] 10 B. H. C. R. 37.

of by the Privy Coundil on appeal in in the judgment in *Damodar Gordhan* v. *Deoram Kanji* (2). As pointed out by counsel for the respondent, the Bombay High Court in the judgment in *Damodar Gordhan's* (1) overlooked the Charter of the East India Company, dated 1758, which provides that: "The East India Company shall and may, by any treaty or treaties of peace, made or to be made between them, or any of their officers, servants or agents, employed on their behalf, and any of the Indian Princes or Governments, cede, restore, or dispose of any fortresses, districts or territories acquired by conquest from any of the said Indian Princes or Governments, and which shall be acquired by conquest in time coming."

So far as it is material for the purpose of this case, the power so conferred upon the East India Company may be said not to have been interfered with by any of the Regulating Acts, namely, 13, Geo. 3, Ch. 63 and 24, Geo. 3, Ch. 25. S. 15 of the latter Act empowered the Board of Commissioners for the Better Government of the East Indies, if they considered the subject-matter of their deliberations concerning the levying of war or making of peace, or treating or negotiating with any of the Princes or States in India to require secrecy, to send secret orders and instructions to the secret committee of the Court of Directors who shall thereupon transmit their orders according to the tenor of the said orders and instructions of the said Board to the respective Governments and presidencies in India and that the said Governments and presidencies shall pay faithful obedience to the orders and instructions so conveyed to them. It is not suggested that any secret orders or instructions or any orders or instructions of any kind were sent to the Governor-General to prevent the cession of territory as part of the peace treaties with the Mahratha Confederacy in the years 1818 to 1820.

It follows from what has been said as to the powers and status of the Kurundwad jahagirdas that they are Ruling Chiefs and cannot be sued without the consent of the Governor-General, which has not been obtained in this case. The suit therefore against defendant 2 is bad on that account, and it is unnecessary to go into the question whether the suit is also bad on the ground that they are sirdars and cannot be sued in any Court except in the Court of the agent to the sirdars. It appears to us that no cause of action has arisen to the plaintiff against defendant 1 or defendant 2 on account of the refusal by the Collector of Dharwar to grant him what he asks as stated in the plaint. We are of opinion that all the issues found by the learned District Judge have been correctly found and that the suit has been rightly dismissed. We therefore affirm the decree and dismiss the appeal with costs. Separate sets of costs.

**Shah, J.**—I concur.

G.P./R.K. *Appeal dismissed.*

(2) [1875-76] 1 Bom. 367=3 I. A. 102(P.C.).

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## A. I. R. 1919 Bombay 126

SCOTT, C. J. AND HAYWARD, J.

*B. B. & C. I. Ry.*—Defendants—Applicants.

v.

*Ranchhodlal Chhotalal & Co.*—Plaintiffs—Opponents.

Civil Extra. Appln. No. 257 of 1918, Decided on 8th April 1919.

**(a) Railway Acts (1890), S. 72—Risk note B—Railway is not liable for loss unless neglect proved—Running train robbery excepted—On proof of neglect railway remains absolved only by proof of running train robbery.**

Where goods are booked for conveyance by a railway under risk note, Form B, and in consideration of a special reduced rate being charged the consignor agrees to hold the Railway Administration harmless for any loss except for loss of a complete consignment or complete package due to the wilful neglect of the Railway Administration or to theft by or wilful neglect of its servants, it being provided that wilful neglect would not include robbery from a running train, then in the absence of proof of wilful neglect or theft by the railway servants, the administration is free from responsibility. If neglect or theft is proved, the administration will escape liability for loss if proof is given of robbery from a running train, etc. [P 127 C 1]

**(b) Evidence Act (1872), S. 103—Onus of proof of neglect by railway is on plaintiff.**

Where the plaintiff alleges wilful neglect or theft by railway servants, under S. 103, it lies on him to give proof of the fact. [P 127 C 1]

*Coltman*—for Applicant.

*N. K. Mehta*—for Opponents.

**Judgment.**—The plaintiffs shipped on the B. B. & C. I. Ry., some 23 bales of cloth under a risk note, Form B, from Ahmedabad to Calcutta. The cloth was loaded in a closed waggon which was sealed. It was the duty of the Guard to examine the seals at every station. He went round the train at Ankleshwar and

gave a certificate that all was right. At Surat, the next station at which the trian stopped, one of the doors of the waggon was found to be open and one of the plaintiffs' bales was missing. Some of the cloths from the bale were subsequently discovered to have been sold by an inhabitant of Mitali, four miles on the Surat side of Ankleshwar. He was convicted and sentenced, but at the trial there was no finding that any railway servant took any part in the theft of the cloths. Under the risk note, in consideration of a special reduced rate being charged, the consignor agreed to hold the Railway Administration harmless for any loss except for loss of a complete consignment or complete package due to the wilful neglect of the Railway Administration or to theft by or wilful neglect of its servants. Provided that wilful neglect was not to be held to include robbery from a running train.

The learned Judge, after recording evidence, observed that there was absolutely no evidence to prove that there was any theft from the train; but no doubt the bale was stolen and the goods must have found their way out but there was no evidence to prove that the bale was lost whilst the train was running. He therefore held the defendants had failed to prove the theft from the running train and passed a decree for the plaintiffs for the amount claimed. This judgment shows confusion as to the terms of the risk note. In the absence of proof of wilful neglect or theft by the railway servants the administration is to be held free from responsibility. If however neglect or theft by railway servants is proved, the administration will escape liability for loss if proof is given of robbery from a running train, etc. The plaintiffs wish the Court to believe that there was wilful neglect or theft by railway servants, it therefore lies on the plaintiffs under S. 103, Evidence Act, to give proof of the fact. This they have not done and no question is reached of robbery from a running train. This conclusion accords with the decision of the Allahabad High Court in *E. I. Ry. Co.* v. *Nathmall Behari Lal* (1). We set aside the decree and dismiss the suit with all costs on the plaintiffs.

G P./R.K. *Application accepted.*

(1) [1917] 39 All. 418=39 I. C. 130.

## A. I. R. 1919 Bombay 127

SCOTT, C. J. AND SHAH, J.

*Vaman Gururao Deshpande*---Plaintiff—Appellant.

v.

*Krishnaji Timmaji Kulkarni* and *others*—Defendant—Respondents.

First Appeal No. 272 of 1915, Decided on 26th November 1918, against decision of First Class Sub-Judge, Bijapur, in Civil Suit No. 44 of 1914.

**Hindu Law—Adoption — Adopted son of Patita is not disqualified to succeed to his father's separated property.**

A person who acquires a share in property by partition and afterwards becomes a "patita" by the commission of a crime of which he is found guilty, is not prohibited by the Hindu Law from adopting a son and there is no disqualification in such adopted son from inheriting to his father's property. [P C]

*Jaykar* and *H. B. Gumaste*—for Appellant.

*Coyajee, Rangnekar* and *R. A. Jahagirdar*—for Respondents.

**Scott, C. J.**—This suit is filed by the plaintiff to recover possession of certain vatan property which belonged to one Narsingrao, who died in December 1910. The plaintiff claims to be the nearest heir of Narsingrao, and impleads defendant 1 who claims to be the adopted son of the deceased and defendants 2 and 3 who it is said are nearer heirs than the plaintiff in the event of there being no adopted son. Narsingrao was concerned in the murder of a mahar many years ago, and having been found guilty was transported to the Andamans. He returned about the year 1884 from his transportation and went to Benares before returning to the Bijapur District where his property was situated and performed the prayaschitta or penance for purification prescribed by the Hindu texts. The fact that he performed this prayaschitta is proved to our satisfaction, as it was proved to the satisfaction of the lower Court. The issues raised in the trial Court were whether the plaintiff was the nearest heir of Narsingrao; whether Narsingrao adopted defendant 1; whether he was competent to adopt on account of the conviction whether the incompetency was removed by the prayaschitta he took; and whether he took the prayaschitta. All these issues have been found against the plaintiff and in favour of defendant 1. The question whether the plaintiff is the nearest heir of Narsingrao is immaterial, if defendant 1 is proved to have been

adopted by Narsingrao validly so as to vest in him on Narsingrao's death the property of the deceased.

The first question then to be considered is the question of fact: Did Narsingrao adopt the defendant. Defendant 1's case is that he was adopted on 6th September 1910, and on 22nd November an adoption deed was executed by Narsingrao in his favour. The interval of time which passed between the date of the alleged adoption and the execution of the deed is strongly relied upon on behalf of the appellant as a suspicious circumstance which should induce the Court to hold that the adoption is not proved. If the fact of the adoption is satisfactorily established as having taken place on 6th September, there can be no doubt whatever that the adoption deed was the concluding part of the acts which Narsingrao thought necessary, for not only has the deed been attested by various witnesses some of whom have been called, and believed by the lower Court but Narsingrao had the document registered in his lifetime and acknowledged his execution of the deed. The fact of the adoption on 6th September is proved by the evidence of various witnesses. There are relations of the parties and there are castemen of the deceased and certain Lingayat witnesses also all of whom speak to the factum of the adoption and the document, Ex. 77 which is the deed acknowledged by Narsingrao before the Registrar refers to the adoption as having taken place on 6th September.

The learned counsel for the appellant, in order to parry the direct evidence of adoption has suggested various defects which he said should induce the Court to hold the adoption not proved. I have already referred to the interval which took place between the ceremony and the execution of the deed, which is one of the points relied upon. The learned counsel says that there was a state of pollution off and on in Narsingrao's family in consequence of which it is unlikely that anything would have been done in the matter of an adoption, and there were astrological objections to the performance of the adoption which however relate to dates subsequent to that on which the ceremony is said to have taken place, and there was an unpropitious conjunction of planets during a time between the date assigned for the adoption and the date of the execution of the deed, it is not however suggested that the unpropitious conjunction of Jupiter and Venus would invalidate a previously performed ceremony.

Then it is said that if the adoption had taken place on 6th September, the adopted son would have changed his name earlier than he did. He was in fact a schoolmaster who is on the rolls of the educational establishment under a particular patronimic, that of his natural father. It appears that until he got the authority of his superiors to assume the name of his adoptive father, he continued to sign himself in the school registers or attendances of pupils under the name of his natural father. His family name did not change with the adoption, as he was a Deshpande before and a Deshpande after the adoption. Another reason why he should not at once assume the name of his adoptive father was that as he passed into a Vatandar family, it was necessary for him to advise the Collector upon the subject. These seem to be sufficient reasons in the circumstances of the case for the delay in the adoption of the new name. The delay itself is not sufficient having regard to the direct evidence of the adoption and the recital in the adoption deed, acknowledged by the deceased, for holding that there was no adoption in fact. We therefore have no hesitation in accepting the conclusion of the learned Judge upon issue 2 that Narsingrao did adopt defendant 1.

Issue 3 is whether he was competent to adopt on account of the conviction and the fourth is whether the incompetency was removed by the prayaschitta which he took. We have not been referred to any text or any judicial authority for the proposition that one who has become "patita" (**) owing to his having committed a murder is disqualified from adoption of a son. On the other hand the high authority of Mr. Mayne has been referred to by the learned counsel for the respondent, who states that there seems to be no reason why the adopted son of a disqualified person should not succeed to all the property which had already vested in his father or which was acquired by him. Now the property which we are concerned with in this suit is the share of Vatan property falling to Narsingrao on partition between himself and his co-parcener Swamirao. That share

had been acquired by him on partition prior in date to his becoming a "patita" by the commission of the crime of which he was found guilty. The author of the Mitakshara, in dealing with the text of Yajnavalkya which relates to the exclusion of persons from inheritance in Ch. 2, S. 10, para. 6, observes:

"They (i. e., disqualified persons) are debarred of their shares, if their disqualification arose before the division of the property. But one already separated . . . is not deprived of his allotment."

A person therefore who has already separated and obtained his share before his disqualification is not a person who is disinherited by reason of such defect and if there is no prohibition of adoption by such a person, and if the highest authority obtainable is to the effect that the adopted son of such a person is not disqualified from inheriting to his father's property, it follows logically that defendant 1 is entitled to inherit. This is the real question in the suit, although it is not raised as a specific issue in the lower Court or stated in the memorandum of appeal. If it be necessary to go further, it may be pointed out that in para. 7: Vijnanesvara says;

"If the defect be removed by medicaments or other means as penance and atonement at a period subsequent to partition, the right of participation takes effect, by analogy to the case of a son born after separation,"

that is to say, that the effect of prayaschitta is to enable a disqualified person to re-open the partition and assert his right to a share in the property. Again para. 9 seems to tell against the contention of the appellant : Thē disinherison of the persons above described seeming to imply disinherison of their sons the author adds : But their sons, whether legitimate or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects, so that even in the case of one who has not acquired his property before pollution, and who has not performed such prayaschitta as would entitle him subsequently to assert his right to the property, his aurasa son would not be disentitled, to succeed presumably to the grandfather's property, while in the case of persons who have acquired their property before a pollution or defect, or who have performed satisfactory prayaschitta, and asserted their right thereafter successfully, there is no text which indicates any disqualification for inheritance in the natural or adopted sons of such peasons. For these reasons it appears to me that the conclusion arrived at by the learned Judge in favour of defendant 1 is correct. I would therefore affirm the decree and dismiss the appeal with costs.

**Shah, J.**—I concur. I desire to state briefly my reasons for the conclusion on the question of law that has been raised on behalf of the appellants as to the validity of the adoption of defendant 1 by the deceased Narsingrao. The contention is that the adoption is invalid, because Narsingrao was a patita at the date of the adoption, and that a patita cannot make a valid adoption. He is said to be a patita within the meaning of the word as used in Yajnavalkya's verse and as explained by Vijnanesvara in the Mitakshara on account of his having committed the murder of a mahar about the year 1864.

In the first place, it is not made out that Narsingrao was a patita at the time of the adoption in 1910. Narsingrao performed the necessary prayaschitta at Benares when he returned to India in 1885 after serving out the sentence of transportation for life. Vijnanesvara points out that if the defect be removed by medicaments or other means, the disqualification ceases to exist : (see Mitakshara, Ch. 2, S. 10, para. 7, Stokes' Hindu Law, p. 457). The expression 'or other means,' according to Balambhatti, would include prayaschitta, (penance). Thus if the defect was capable of removal by penance, it had been removed in the present case. Further the word patita according to Vijnanesvara means brahmahadih and he includes a person guilty of a secondary sin upapataka among the persons indicated by the word adi in Yajnavalkya's verse. It is probable that Vijnanesvara interprets the word patita as meaning a person guilty of any of the mahapatakas enumerated by Yajnavalkya in the Prayaschitta Adhyaya, verse No. 227, beginning with the word brahmaha, and it is clear that he could not have meant to include in that term persons guilty of upapatakas mentioned in verses Nos. 234 to 242. It may be however that Narsingrao was subject to the disqualification arising in consequence of his having committed a murder, being a person indicated by the word adi as explained by Vijnanesvara (see Mitakshara, Ch. 2,

S. 10, para. 3). The proposition however has no practical importance in this case, as Narsingrao had already taken his share of the family property before he became thus disqualified : and according to the Mitakshara he would be deprived of his share if the disqualification arose before the division of the property, but as one already separated from his co-parceners, he would not be deprived of his allotment (Mistakshara, Ch. 2, S. 10, para. 6, Stokes' Hindu Law, p. 456).

The next question is whether Narsingrao could not make a valid adoption, assuming that he was otherwise disqualified, though not a patita, from inheriting or claiming a share at the time of the adoption. No text or authority has been cited on behalf of the appellants to show that such an adoption would be invalid. It is conceded that an adoption is not a sanskara according to Hindu law. I see no reason to hold that a person subject to the disqualification, to which Narsingrao is assumed to have been subject at the time of the adoption, could not make a valid adoption. Mr. Jayakar has relied upon Mitakshara, Ch. 2, S. 10, paras. 9, 10 and 11 as showing that a son other than an aurasa or kshetraja son is subject to the same disqualification as his father as regards inheritance and partition. This however does not effect the validity of an adoption by a person subject to a disqualification mentioned in Yajnavalkya's verse as explainad by Vijnaneswara. The meaning is that an adopted son cannot claim any share in the property, to which his father is disqualified from putting forward any claim. But there is nothing to prevent an adopted son from claiming the property already vested in the adoptive father on partition before the disqualification arose, though he may be prevented from claiming a share in the ancestral property not so vested The adoption would be valid, but ineffective for the purpose of securing a share in the property, from which the adoptive father is excluded on account of the disqualification. Mr. Mayne has expressed the same opinion in his work on Hindu law (Edn. 8, S. 598, p. 839). The author of the Dattaka Chandrika in S. 6, para. 1, takes the same view, and suggests by implication that a disqualified person is not prevented from making an adoption, though the adopted son may have no right to the estate of the paternal grandfather.

I am therefore of opinion that the appellants have failed to establish either that Narsingrao was patita at the date of the adoption : or that, assuming that he was subject to a disqualification at the time, he could not make a valid adoption. It is not necessary to consider the question whether plaintiff 1, who is the grandson of the brother of Narsingrao, is entitled to succeed in preference to defendants 2 and 3, who are the sons of Narsingrao's father's brother, according to the Mitakshara.

G.P./R.K. *Appeal dismissed.*

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## A. I. R. 1919 Bombay 130

SCOTT, C. J. AND HAYWARD, J.

*Raoji Baburao*—Applicant.

v.

*Bansilal Narayan Marwari*— Opponent.

Civil Extraordinary Appln. No. 74 of 1918, Decided on 12th February 1919, against decision of District Judge, Nasik, in Misc. Appeal No. 2 of 1917.

**(a) Civil P. C. (5 of 1908), O. 21, R. 89—Deposit by judgment-debtor does not suffice—It must be accompanied by application.**

Where property is sold in execution of a decree the mere deposit by the judgment-debtor of the amount of the decree within thirty days of the sale cannot be regarded as an application under O. 21, R. 89, Civil P. C., to set aside the sale. [P 131 C 1]

**(b) Civil P. C. (5 of 1908), S. 115 and O. 21 R. 90—Application more than three years after sale rejected—Held there is no ground for revision.**

Where an application by a judgment-debtor to set aside a sale of his property in execution of the decree against him made more than three years after the confirmation of the sale was dismissed as time barred.

*Held*: that there was no ground for the exercise of the powers vested in the High Court under S. 115, Civil P. C. [P 131 C 1]

**(c) Civil P. C. (5 of 1908), O. 21, Rr. 89 and 90—Object of fixing 30 days is to settle auction-purchaser's title as soon as possible.**

The policy of the legislature in providing short periods within which applications should be made to set aside sales, is that titles arising from judicial sales should be settled as soon as possible. [P 131 C 1]

*R. A. Jahagirdar*—for Applicant.

*P. B. Shingne, M. R. Bodas* and *K. M. Bodas*—for Opponent.

**Judgment**. —Less than thirty days before 3rd September 1915 the property of the applicant was sold in execution of a decree against him, and on 3rd September, the applicant deposited in

Court the amount of the decree together with interest on the purchase money for the property sold. He obtained from the nazir of the Court, who received the money, a receipt which recorded that it was paid on account of the darkhast and on account of interest. But no application was made at that time to set aside the sale. Presumably the intention was to do what was required under O. 21, R. 89. No application having been made to set aside the sale, the sale was confirmed in January 1916, and thereafter the Court gave notice to the applicant as depositor to take away his money. He then applied that his deposit should be considered as an application to set aside the sale. That application was refused and the applicant did not appeal, although he was represented by a pleader. Then later he repeated his previous application which was rejected by the Subordinate Judge, and after that an appeal was preferred to the District Court, which was asked to deal with the matter under S. 151 of the Code, for making such order as might be necessary to prevent abuse of the process of the Court or for the ends of justice. The learned District Judge having rejected the appeal the applicant now comes here under S. 115 of the Code for the interference of the High Court. It is difficult to see how this application will lie under S. 115.

There is no defect whatever in jurisdiction, no irregularity in the exercise of jurisdiction. All the irregularities are on the side of the applicant. The Code, with the Lim. Act, provides a short period within which applications specifying their object should be made to set aside sales, and the shortness of time allowed may be taken as indicative of the policy of the legislature that titles arising from judicial sales should be settled as soon as possible. Now we have an application before us, three years after the confirmation of a judicial sale, to set it aside, the reason being that the applicant who ought to have applied to the Court did not apply to the Court when he deposited his money. We should be violating the principle under which the rules are framed for obtaining finality at an early date in such matters if we were to accede to the present application, even if we assume that it could be brought within the terms of S. 115. The applicant's only remedy is to take back his money. The concession which is allowed to judgment-debtors is only allowed under certain conditions. Those conditions do not exist in the present case. We must therefore discharge the rule with costs. One set of costs.

G.P./R.K. *Rule discharged.*

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## A. I. R. 1919 Bombay 131

SCOTT, C. J. AND SHAH, J.

*Khimji Bhimsi*—Defendant — Appellant.

v.

*Chunilal Ambaidas*—Plaintiff— Respondent.

Second Appeals Nos. 1033 of 1915 and 323 of 1916, Decided on 19th November 1918, against decision of Dist. Judge, Khandesh, in Appeal No. 242 of 1914.

**Hindu Law—Damdupat—Rule of—In case of agreement to interest upon interest rule of damdupat does not apply—Rule requires that interest shall not exceed principal in one transaction—It does not prevent agreement to capitalize interest and charge interest on it.**

Where in a suit to recover a sum of money the amount it is sought to recover is, for the most part made up of interest which largely exceeds the principal, and there is an agreement in writing whereby the debtor agrees to pay interest upon interest, there is nothing to prevent the Court from awarding the full sum claimed, both as a matter of natural inference from the agreement and as a matter of Hindu law.

Per *Shah, J.*—The rule of damdupat requires that the interest in the course of one transaction shall not exceed the principal. But it does not prevent an agreement between the debtor and creditor to capitalize interest at a stage when the interest does not exceed the principal. All the Smriti writers and the commentators are agreed that there must be an agreement between the debtor and the creditor to capitalize interest in order to justify the calculation of interest in future on the sum made up of the principal and the interest thus agreed to be capitalized.

[P 133 C 1]

*D. C. Virkar*—for Appellant.

*G. S. Rao*—for Respondent.

**Scott, C. J.**—In Appeal No. 1033 of 1915 it is agreed between the parties that there is a mistake in the figure mentioned in the District Judge's judgment, and that "983," should read "938", and it may be taken that the judgment is inaccurate in that respect. Whether the judgment should stand in its amended form is a question which has to be decided in the other appeal, No. 323 of 1916. Chunilal brings this suit against Nathu Shivji. Ambaidas, the father of Chunilal, and Nathu Shivji were partners in equal shares in a cotton business. The partnership was dissolved on 3rd November 1899,

the business having resulted in a loss. On 21th September 1900 Nathu Shivji admitted by an acknowledgment in the accounts that he was indebted to Ambaidas in the sum of Rs. 1,022-12-0. The acknowledgment runs as follows:

. "Cotton was pressed into bales in partnership between you and me. Therein a loss was sustained. As to the amount of loss falling to my share an account in respect thereof was made and Rs. 1,022-12-0 were found due as up to this day."

On 22nd September 1903, just before the expiry of three years from the date of the last acknowledgment in account, a fresh acknowledgment was signed by Nathu Shivji stating that an account in respect of the previous khata was made and a balance of Rs. 1,033-10-0 was found due. Before the expiry of three years from that date, another acknowledgment was signed by Nathu Shivji stating that an account in respect of previous khata was made and Rs. 1,694 were found due, and a little less than three years later a further acknowledgment was signed by Nathu Shivji stating that an account in respect of the previous khata was made and Rs 2,071 were found due. Rs. 2,071, together with interest from the date of the acknowledgment, namely 19th September 1909, until the date of suit, amount to Rs. 2,600. For that sum the plaintiff has instituted this suit. The learned trial Judge passed a decree for the amount claimed with costs and interest on Rs. 2,600 at 6 per cent from the date of suit to payment. On appeal to the District Judge the decree was modified by the reduction of the decretal sum from Rs. 2,600 to Rs. 1,877-10-6, the reason being that the learned Judge was of opinion that the rule of damdupat applied and prevented the recovery of any more that the lastmentioned sum, thereby differing from the conclusion arrived at by the learned trial Judge. The decision appears to have been based upon the penultimate paragraph in the case of *Shankar* v. *Mukta* (1), in which it was said:

"How much of this is due for principal and how much for interest is a matter of calculation, but the interest recoverable by suit is limited by the amount of principal originally advanced."

There was in that case no discussion of the texts in Hindu law bearing upon the rule of damdupat, and the decision is expressed to be based upon an unreported case of *Motilal* v. *Shivram*, Second Appeal No. 43 of 1894. In a later case in this Court, *Sukalal* v. *Bapu* (2), the texts relating to damdupat in the matter of loans were fully considered in the judgment of Sir Lawrence Jenkins, and the Court was of opinion that in the case of a bond where there was an express agreement for payment of interest on capitalized interest exceeding the original principal, there was nothing to prevent a decree for a larger sum than the principal originally advanced. In the present case we are dealing with mercantile accounts which are ordinarily made up from year to year with yearly rests for interest calculated at the time of Diwali. But owing to the business having ceased to be a going concern, presumably the practice of yearly rests was not followed from the date of first adjustment referred to, but rests were taken at intervals of three years at the times when acknowledgments were required to prevent the operation of the law of limitation. In the present case we have had the advantage of an argument on behalf of the respondent from Dewan Bahadur Rao, in which he attempted to meet the case made upon the Hindu law texts relied upon by the learned trial Judge and adverted to in the judgment of the Court in *Sukalal* v. *Bapu* (2). His argument resolves itself into this: that there is nothing in the texts which would prevent an agreement amounting to a new transaction between the parties, the debtor and the creditors, for payment of a larger sum than double the amount of principal, provided the agreement was clearly proved; that by reason of certain expressions in texts of Brihaspati and Manu that proof could only be by a document in writing, and that the acknowledgments signed in the books in the present case could not be held to be writings satisfying the necessities of the rule, because in *Shankar* v. *Mukta* (1) it has been held that a signed ruzukhata cannot in Bombay Courts, be taken as anything more than an acknowledgment of liability for the purpose of saving limitation, and does not give rise in itself to a fresh cause of action, and therefore that the ruzukhatas cannot be taken to amount to a fresh agreement such as was contemplated by the Hindu Smriti writers.

It appears to me however that the decision in *Shankar* v. *Mukta* (1) must be taken subject to a recognized mercan-

(1) [1898] 22 Bom. 513.

(2) [1900] 24 Bom. 305.

tile usage, that interest can be capitalalized between Hindus at the end of each year, and a fortiori no objection can be taken to the capitalization at the end of every three years in relation to mercantile accounts, where the yearly settlement of accounts has ceased owing to the ceasing of the business. As regards the requirements of proof under the Hindu law, if that can be considered as part of the substantive Hindu law, and not now rendered obsolete by the rules of procedure in Anglo-Indian Courts, it is to be observed that the translators of the text of Manu relied upon by Dewan Bahadur Rao are by no means unanimous in agreeing that Manu thought a writing to be necessary, and that out of several Hindu law texts, which have been refered to, Brihaspati is apparently the only one in which the necessity for a writing is clearly mentioned. We have in each of ruzukhatas a written document in which there is the clearest implication that the party liable agrees to pay interest upon interest, because the sum mentioned in easch of the three last ruzukhatas is only arrived at by calculating interest upon interest, and that is the sum which is acknowledged to be due. It therefore appears to me that both as a matter of natural inference from the documents, and as a matter of Hindu law, there is nothing to prevent the Court from awarding the full sum claimed, and that therefore the judgment of the District Judge should be set aside and that of the trial Judge restored in its entirety with costs throughout upon the respondent.

**Shah, J.**—I agree. I desire to add with reference to the rule of damdupat that it requires that the interest in the course of one transaction shall not exceed the principal. But it does not prevent an agreement between the debtor and the creditor to capitalize interest at a stage when the interest does not exceed the principal. All the Smriti writers and the commentators are agreed that there must be an agreement between the debtor and the creditor to capitalize interest in order to justify the calculation of interest in future on the sum made up of the principal and the intetest thus agreed to be capitalized. The question whether that agreement should be in writing or not is one upon which the Smriti writers are not unanimous. But in my opinion in the present case whatever agreement there is between the parties is in writing, and therefore the difference on that point between the Smriti writers is not a matter of any practical importance in the present case.

The question really is whether the acknowledgments passed by the debtor from time to time afford a fair basis for the inference that the debtor agreed to capitalize the interest. On that point, having regard to the four acknowledgments passed by the debtor, it is clear that he agreed to capitalize interest at the intervals at which he passed those acknowledgments. In this respect the present case is really different from the case of *Shankar* v. *Mukta* (1). The transaction here is one between two merchants; and there is no reason to suppose that when the debtor acknowledged the particular amount to be due on calculating the interest not only on the original principal, but on the principal plus the interest which was acknowledged on a previous occasion, he meant anything but an agreement on his part to treat the sum thus agreed to be due as principal for the calculation of interest in future. Whether such an acknowledgment can form the basis of an action or not is not the question in the present suit, and it may be that in the case of *Shankar* v. *Mukta* (1) there was not sufficient basis for an inference as to the agreement between the debtor and the creditor for the capitalization of interest. But in the present case it seems to me that the trial Court was right in inferring such an agreement, and the passing of the acknowledgments by the debtor seems to me to be consistent only with that inference.

G.P./R.K. *Decree set aside.*

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## A. I. R. 1919 Bombay 133

SCOTT, C. J. AND MACLEOD, J.

*May Geraldine Duckworth*—Plaintiff—Appellant.

v.

*George Francis Duckworth*—Defendant—Respondent.

First Appeal No. 235 of 1917, Decided on 28th August 1918, from order of Dist. Judge, Ahmednagar, in Darkhast No. 8 of 1917.

**(a) Army Act (1881, 44 and 45 Vict. C. 58)—Ss. 90 and 145—Decree for alimony sought to be executed against First Class Warrant Officer by attachment of pay under S. 60, Civil P. C.—Order passed subsequently by**

**Commander-in-Chief under S. 145, Army Act, for deducting certain amount from pay of the officer—S. 145 held to prevail over Civil P. C.—Civil Court held to have no power to attach pay—Civil P. C, S. 60.**

Plaintiff obtained a decree for alimony and maintenance for herself and her children against the defendant who was a First Class Warrant Officer of the British Army and sought, in execution of the decree, to attach a sufficient portion of the defendant's pay under S. 60, Civil P. C. In the meanwhile under the provisions of S. 145, Army Act, 1881, the Commander-in-Chief had ordered that a particular sum should be deducted from the pay of the defendant for payment to the plaintiff:

*Held*: that S. 145, Army Act, prevailed over the provisions of the Civil Procedure Code, and that the defendant being a "soldier" within the meaning of S. 90, Army Act, and an order having been made by the Commander-in-Chief under the provisions of S. 145 of the Act, the civil Courts had no power to attach any part of the defendant's pay. [P 134 C 2]

**(b) Civil P. C. (1908), Ss.4, 60 (2) (b)—Sub-S. 60 (2) (b) may be taken to be dead law in view of enactment of Army (Amendment) Act 2. 1915 (5 and 6 Geo. V, C. 58).**

Per *Scott, C. J.*—Sub-S. 60 (2) (b), Civil P. C., may be taken to be dead law on the ground that it had "expired" by the re-enactment since 1908, of the Army Act, which thus became a later enactment superseding and rendering unnecessary the saving clause in the section. Even if this were not so, the provisions of S. 4, Civil P. C., and the maxim *generalia specialibus non derogant* would compel the Court to apply in such matters the rule of procedure provided by S. 145, Army Act, in preference to the general provisions of the Code. [P 134 C 2]

*Campbell* and *J. G. Rele*—for Appellant.

*Jayakar* and *P. B. Shingne*—for Respondent.

**Scott, C. J.**—This is an appeal from the District Judge of Ahmednagar, who has dismissed an application under the Civil Procedure Code for execution of an order for alimony in favour of the first wife and children of the respondent Duckworth. The respondent's marriage with the appellant was dissolved by the District Judge of Ahmednagar and the decree for dissolution was confirmed by the High Ccurt.

The respondent is a First Class Warrant Officer of the British Army and as such he falls within the definition of "soldier" in the Army Act, 44 & 45 Vic. c. 58, S. 90. S. 145 of that Act provides a special procedure when any order or decree is made for payment by a man, who is a soldier, of the cost of the maintenance of his wife or child. Under the provisions of that section, as amended by Army (Amendment) Act 2 of 1915, the Commander-in-Chief ordered that a particular sum should be deducted from the pay of the respondent for payment to the appellant. This sum is less than the monthly sum awarded by the order of the District Court. For the appellant it is contended that, although S. 145, Army Act, might once have prevailed over the provisions of the Civil Produre Code owing to the express saving of the Army Act by S. 60 (2) (b) of the Code of 1908, the saving words have now been repealed by the Repealing and Amending Act 10 of 1914, and therefore the appellant has a right to demand the application of the Code and get attachment of one moiety of the respondent's pay and allowances. In support of this contention the decision of a Bench of the Allahabad High Court in *H. F. B. D. Hay* v. *Ram Chander* (1) is referred to. We are unable however to hold that the removal of sub-S. (b), S. 60 (2) from the Civil P.C., has the effect contended for. It was removed by a Repealing and Amending Act (10 of 1914) on the ground that it, as well as the other enactments referred to in Sch. 2, were spent or had ceased to be in force otherwise than by express specific repeal or had by lapse of time or otherwise become unnecessary. The preparation of these Acts is part of the routine work of the Legislative Department in the expurgation of dead law from the Statute Book. They are not amending Acts. The subsection may be taken to be dead law on the ground that it had "expired" by the re-enactment since 1908 of the Army Act, which thus became a later enactment superseding and rendering unnecessary the saving clause in the Civil Procedure Code: see Craies on Statute Law, Ch. 5. Even if this were not so, the terms of S. 4, Civil P. C., and the maxim "*generalia specialibus non derogant*" would compel us to apply the special rule of procedure provided by S. 145, Army Act, in preference to the general provisions of tht Code. We affirm the decree and dismiss the appeal. No order as to costs.

**Macleod, J.**—The respondent, an Assistant Surgeon in the Indian Medical Service, is a gazetted officer and therefore a public officer, so that prima facie his pay and allowances

(1) [1917] 39 All. 308=39 I. C. 92.

would be liable to attachment to the extent of one-half under S. 60, Civil P. C. But he is also a First Class Warrant Officer and is therefore a "soldier" as defined by S. 90, Army Act. Under S. 145 (2) of that Act an order has been made by the Commander-in-Chief that a sum of 1s. 6d. per diem, the maximum allowed, should be deducted from the respondent's pay in respect of the alimony and maintenance awarded to the appellant for herself and her three children by the District Judge, Ahmednagar. I agree with the learned Chief Justice that we must hold that in this case the Army Act prevails over the Civil Procedure Code. The respondent has married another woman before the period prescribed by the Divorce Act expired. She is allowed Rs. 150 a month by the authorities out of the respondent's pay, while the wife and children whom he has deserted get 1s 6d. a day.

G.P./R.K. *Appeal dismissed.*

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## A. I. R. 1919 Bombay 135

HEATON AND PRATT, JJ.

*Sabduralli* and *others*—Defendants—Appellants.

v.

*Sadashiv Supde*—Plaintiff — Respondent.

Second Appeal No. 654 of 1916, Decided on 3rd December 1918, against decision of Asst. Judge, Khandesh, in Appeal No. 271 of 1914.

**(a) Civil P. C. (1908), O. 34, R. 1—All heirs of mortgagor not joined—On objection even they were not joined as claim against them was barred—Effect of nonjoinder was release of their share.**

A mortgagee brought a suit to enforce his mortgage by sale of the mortgaged properties against some only of the heirs of the mortgagor. On objection being taken that the suit was bad for nonjoinder of the other heirs the mortgagee refused to join them as the period of limitation as against them had expired:

*Held*: that the effect of the nonjoinder of some of the heirs of the mortgagor was that the mortgagor lost his right to enforce the mortgage charge against that part of the security which was represented by the shares of the excluded heirs, but that the mortgagee was still entitled to enforce his charge against the rest of the property and there was no bar to the jurisdiction of the Court to entertain the suit as framed.

[P 136 C 1]

**(b) Civil P. C. (1908), S. 99—"Misjoinder" includes nonjoinder.**

Per *Pratt, J.*— S. 99 refers to misjoinder of parties, but misjoinder includes nonjoinder.

[P 135 C 2]

**(c) Civil P. C. (1908), O. 34, R. 1—Test under Limitation Act, S. 22 and O. 34, R. 1, is same—Only question to be considered is whether suit was properly constituted on date of plaint—Limitation Act, S. 22.**

The test both under O. 34, R. 1, Civil P. C. and S. 22, Lim Act, is the same, viz was the suit properly constituted at the date of the plaint so as to enable the Court to adjudicate as between the parties, impleaded : [P 137 C 1]

*S. M. Kaikini*—for Appellants.

*P. B. Shingne*—for Respondent.

**Pratt, J.**—In this suit the mortgagee who is the respondent in this appeal sued to recover the mortgage debt by sale of properties mortgaged in 1896 by the deceased Sabdaralli. The suit was brought within the extended period of limitation allowed by S. 36, Limitation Act 1908, and the original mortgagor having died before the suit, his wife and daughters—the appellants—were made defendants. Objection was taken in the first Court that the suit was bad for nonjoinder of other heirs of Sabdaralli, his brother and sister's children. But the mortgagee did not join them in spite of the objection as the period of limitation as against them had expired.

The Subordinate Judge held that the nonjoinder of these heirs was not fatal to the suit and decreed the suit as against the interest of the wife and daughters. The lower appellate Court confirmed this decree and the wife and daughters in this appeal contend that the provisions of O. 34, R 1, are imperative and that the nonjoinder of the heirs admittedly interested in the equity of redemption necessitated the dismissal of the suit. This is the only point raised in the appeal. Now the mortgage security is of course indivisible and the mortgagee must sue to realize the whole of his debt out of the property mortgaged. This is the substantive law enacted in S. 67, T. P. Act. Then O. 34, R. 1, is a rule of procedure that all persons interested in the mortgage security or the right of redemption shall be made parties to the suit. The object of this rule is clearly to avoid multiplication of suits; but does a breach of this rule involve the consequence that the suit should be dismissed? The answer to this question is, I think, supplied by S. 99 of the Code. That section refers to cases of misjoinder of parties, but misjoinder includes nonjoinder: *Ekkanatha Eachara Unni Valia Kaimal* v. *Manakkat*

*Vasunni Elaya Kaimal* (1). According to that section non-joinder of parties, though a breach of the procedure enjoined by the Code, is not a fatal defect unless it affects the merits of the case or the jurisdiction of the Court. Neither of these conditions is fulfilled in the present case. The right to enforce the mortgage charge against the part of the security represented by the shares of the excluded heirs is lost. The joinder of these heirs will not affect the merits of the case, for it is only the right, title and interest of the defendants that can be sold. The mortgagee, though he has lost part of the security, is entitled to enforce his charge against the rest and there is no bar on the jurisdiction of the Court to entertain such a suit.

The terms of S. 85, T. P. Act (4 of 1882), which corresponded to O. 34, R. 1 were held by the Allahabad High Court in *Mata Din Kasodhan* v. *Kazim Husain* (2) and *Ghulam Kadir Khan* v. *Mustakim Khan* (3) to be imperative, so that failure to join the parties indicated involved dismissal of the suit. These cases proceeded on what was supposed to be the imperative character of the word "must" in S. 85. But this word is now dropped out and the section is incorporated in the Code of Civil Procedure showing that the matter is one of procedure and regulated by S. 99. The judgment in *Mata Din's* case (2) said that the imperative construction was necessary in order that "litigants should be made to know and feel the statute law." This can hardly be admitted as a valid argument and justifies the criticism of Mr. Ghose in his work on the Law of Mortgages in India that Courts exist not for the sake of discipline but for determining matters in controversy between the parties. I think the correct construction was that put upon the section in the dissentient judgment of Mahmood, J., in *Mata Din's* case (2). In the absence of words of prohibition the section is not to be read as if it began by saying that "no suit shall be entertained unless all parties, etc." This view is supported by a dictum of the Privy Council in *Umes Chunder Sircar* v. *Zahur Fatima* (4). At p. 179 of the report their Lordships say:

> "Persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit between the prior mortgagee and the mortgagor to which they are never made parties."

Evidently their Lordships thought a suit on the mortgage would be competent although assignees of the equity of redemption had not been made parties. We have next been confronted with cases on S. 22, Lim. Act, which decide that when necessary parties are not joined within the period of limitation the suit must be dismissed. In *Guruvayya* v. *Dattatraya* (5) it was said that:

> "such a result must depend upon consideration of the question whether the joinder was necessary to enable the Court to award such relief as may be given in the suit as framed;",

for instance, in a suit by one of several joint promisees the other promisees are necessary parties, for no relief can be given to one of them. The suit is not properly constituted unless all the co-promisees join, for the plaintiff can only enforce his claim in conjunction with them: *Ramsebuk* v. *Ramlall* (6). So also a partition suit cannot be constituted unless all the co-parceners are made parties. But on the other hand, when the suit can be constituted without the other parties and their joinder is only desirable, as in *Guruvayya's* case (5),

> "for the purpose of safe guarding the right as subsisting between them and others claiming generally in the same interest",

the suit should proceed and the Court should award such relief as may be given in the suit as framed. That necessary parties mean parties necessary to the constitution of the suit seems to have been the view taken by the Privy Council in the case of *Kishen Parshad* v. *Har Narain Singh* (7). Their Lordships said:

> "By this time the three years allowed by Act 15 of 1877, Sch. 2, Art. 64, had expired, and it became necessary to determine whether or not the additional plaintiffs were really necessary parties, because if not the suit had always been properly constituted and the time under the statute stopped running on 3rd June 1904, (the date of the plaint) within the three years."

The distinction between necessary parties and proper parties is made in O. 7, R. 10 (2), where necessary parties are parties "who ought to have been joined" and who are indispensable, as without them no decree at all can be made, and proper parties are those whose presence

(1) [1910] 33 Mad. 436=5 I. C. 774.
(2) [1891] 13 All. 432 (F. B.).
(3) [1896] 18 All. 109.
(4) [1891] 18 Cal. 164=17 I. A. 201 (P. C.).
(5) [1904] 28 Bom. 11.
(6) [1881] 6 Cal. 815.
(7) [1911] 33 All. 272=9 I. C. 379=38 I. A. 45 (P. C.).

enables the Court to adjudicate more "effectually and completely." This is the distinction made in the passage quoted from Pomeroy on Remedies in *Keshavram* v. *Ranchhod* (8). Now this suit was properly constituted when the plaint was filed, for I have already shown that the Court could award relief against the interest of defendants. S. 22, Lim. Act, does not therefore necessitate the dismissal of the suit. The test therefore both under O. 34, R. 1, and S. 22, Lim. Act, is the same Was the suit properly constituted at the date of the plaint so as to enable the Court to adjudicate as between the parties impleaded? My conclusions both as to the effect of O. 34, R. 1, and S. 22, Lim. Act, are supported by a recent decision of this Court in *Virchand* v. *Kondu* (9). I do not however express agreement with the decision in that suit that the mortgage decree would be binding on the Mahomedan coheirs who were not parties. But this point does not arise for decision. I therefore think the lower Courts were right and would confirm the decree and dismiss this appeal with costs.

**Heaton**, J.—I emphatically agree that the Courts below were right not to dismiss the suit. This is the only matter before us. We are not asked to decide what will be the effect of the decree that has been made; so on that point I say nothing. A mortgagee's claim, when it is put forward in the form taken in these proceedings, is primarily a claim against property. The claim here, so far as it concerned the property, was made in time, the persons cited as defendants were correctly made defendants, but they did not comprise all who should be defendants. Possibly the correct procedure in the trial Court would have been to direct the plaintiff to add the other defendants. But the real attack on the decision of the lower Courts is not on that ground at all. In order to be able to appreciate the true legal position, I will assume that the others were added as defendants and that the claim against them was time barred. I cannot see how in justice or in law it follows that the whole claim must be dismissed. It is not so provided by O. 34, R. 1, either expressly or, as I think, impliedly. The disadvantages of failing to join in time persons who ought to be defendants are quite serious enough without adding to them by dismissing a suit. There is certainly no other provision in the Civil Procedure Code which supports the view that in such circumstances as these a suit should be wholly dismissed.

If that is the position reached after a study of the law of procedure, it remains unassailed by anything to be found in the law of mortgage as I understand it. In the case of *Virchand* v. *Kondu* (9) this Court, in circumstances almost identical with those now before us, arrived at the same conclusion as that we propose to give effect to. It is true that my learned brother and myself have given reasons a good deal different from those given in that case. But where several different lines of reasoning lead to the same result, one is fortified in the belief that the result is correct.

G.P./R.K. *Decree confirmed.*

(8) [1906] 30 Bom. 156.
(9) A. I. R. 1915 Bom. 272=39 Bom. 729=31 I. C. 180.

## A. I. R. 1919 Bombay 137

BEAMAN, J.

*Hukamchand Sarupchand*—Plaintiff.

v.

*Abraham E. J. Abrahim*—Defendant.

Original Civil Suit No. 637 of 1918, Decided on 18th September 1918.

**Contract— Pakka Adatia—Position of—Claim against his principal can be enforced as it based on contract between two principals—Interest can be claimed.**

A pakka adatia can at will become a principal to enforce any contract which has been entrusted to him as agent by his original principal against that principal and when he sues relying upon his character as principal, his claim differs in no respect from that upon an oridinary contract between two principals and he is entitled to demand interest upon the amount which he claims as ordinary damages for breach of contract. (P 137 C 2; P 138 C 1)

*J. D. Davar* and *Desai*—for Plaintiff.

*Strangman* and *R. D. N. Wadia*—for Defendant.

**Judgment**. —The only point in controversy here is whether the plaintiff is entitled to interest on the amount claimed. The answer to that depends upon what is claimed. Is this damages or is it money paid by an agent on account of his principal? Clearly it is damages. A pakka adatia as settled by the law of this Court can at will become a principal to enforce any contract which has been entrusted to him as agent by his original principal against that principal. I have frequently commented up-

on the legal anomalies involved in this entirely new and unique legal entity. But in this Presidency at any rate we must take it as we find it. When, then, a pakka adatia sues, as in the present case, relying upon his character not as agent but as principal and thereby deliberately protects himself against inquiries which ordinarily are made about the amounts he has actualy expended as agent on behalf of his principal it is I think too plain to admit of argument that the claim differs in no respect from that upon ordinary contract between two principals. It cannot be said that the damages claimed are liquidated damages, because by the assertion of his privileged character as pakka adatia the Court cannot go behind the rate fixed by the original contract and the rate prevailing at date of breach. Viewed in any light, therefore it ceases to be arguable that a pakka adatia suing in that legal character can demand interest upon the amount which is thus claimed as ordinary damages for breach of contract. This I believe, is the first time that the point has been definitely raised and that is the only reason why I have thought it necessary to state the simple almost self-evdident reason for deciding it as I do. There will therefore be a decree for the plaintiff for Rs. 1,06,102 and costs and interest on judgment at 6 per cent per annum.

G.P./R.K. *Suit decreed.*

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## A. I. R. 1919 Bombay 138

SHAH AND HAYWARD, JJ.

*Kordia Gopal Katkari* and *others*—Applicants.

v.

*Emperor*—Opponent.

Criminal Revn. Nos. 125, 126 and 127 of 1919, Decided on 10th July 1919, against decision of Resident Magistrate, Bandra.

**Workman's Breach of Contract Act (13 of 1859), S. 2—S. 2 does not apply to contracts which are voidable under Contract Act (1872), Ss. 16 and 19-A.**

It is only where a contract between an employer and a workman is broken by the latter without lawful or reasonable excuse as provided by S. 2, Workman's Breach of Contract Act, that the employer has the right to have recourse to the criminal Courts for the enforcement of the contract. A contract which is liable to be avoided or broken, as having been obtained by undue influence under Ss. 16 and 19-A, Contract Act, cannot be so enforced. [P 139 C 2]

*S. Y. Abhyankar*—for Applicants.

*W. B. Pradhan*—for Opponent.

*Government Pleader*—for the Crown.

**Shah, J.**—This is an application against an order made by the Resident Magistrate of Bandra under Act 13 of 1859. The contracts in question are between certain "Kathodis" and the complainant. The contracts relate to the work to be done as charcoal burners from 1st September 1918 to 15th June 1919. They refer to certain small advances in cash, and the rate of wages is fixed at two annas per bag of charcoal. They also provide that the wages should be set off against the sums advanced and to be advanced to the workmen. It has been found by the Magistrate that

"a Katkari, if he is a good and hardworking workman, manufactures, with the assistance of others and his family, about 300 bags of charcoal in a season of ten months. His earnings therefore at two annas a bag would come to Rs. 37-8-0.

In plain terms, the result of this contract, according to the finding, is that when a workman with his whole family works for ten months, he earns Rupees 37-8-0, that is he earns nearly Rs. 4 per mensen. It is admitted by the complainant in his evidence that the wife and children of the Katkaris work with the Kathodi, that they are not paid separate wages for their work and that their labour is also included in the rate. It is also admitted by him that though he feeds them, he could charge them for the same and would do so in case the workmen did not return to work for the following season. Taking the terms of the contract, as stated in the document, with the finding of the Magistrate and the facts admitted by the complainant, I am wholly unable to accept his conclusion that the conditions of the contract are fair and reasonable. It is suggested before us that these workmen get some further remuneration under some other arrangement or contract. But there is no evidence in support of this suggestion. The fairness of the contracts must be determined on the evidence on the record; and it is hardly possible to treat these contracts, under the circumstances established, to be fair or reasonable. The workmen refused to work though they received the advances; and the question is whether under the circumstances, it is established that they had no lawful or reasonable excuse to neglect or refuse to perform the work as contemplated by

the Act. Having regard to the terms of the contract, it seems to me that it cannot be said that the workmen had no lawful or reasonable excuse to refuse to work.

The learned Magistrate has referred to some other facts which go to show that the complainant treats his workmen with a certain degree of consideration. But it appears from his evidence that the consideration he shows to the workmen means an addition to the legal dues recoverable from them. No doubt it is claimed that if these persons would return to work for the next season, he would not charge them the dues of the preceding season. But that is a matter of concession on his part and not of any right of the workmen under the contract. I do not think that, on such considerations, the terms of a contract which may not be otherwise fair, can be treated as fair for the purpose of determining whether the workmen had a lawful or reasonable excuse to refuse to work. There is no question on the present proceedings of the civil liability of these workmen for the moneys received or for breach of contract. But all breaches of contract are not within the scope of the Act; I am satisfied, on a consideration of the terms of the contract and the other circumstances which are not in dispute, that in the present case the omission on the part of the workmen to perform the work did not render them liable to be dealt with under Act 13 of 1859. I would therefore make the Rule absolute and set aside the order of the Magistrate. The same order in the other companion applications, Nos. 126 and 127 of 1919.

**Hayward, J.**—I concur that the order should be set aside as proposed by my learned brother. The charcoal burners entered into this contract with the contractor:

"I bind myself to work for a season from 1st September 1918 to 15th June 1919. Therefore you have paid me at my request in advance cash Rs. 14. I bind myself to work for you till the amount is paid. The conditions of payment of your money, which is to be paid off by working, are that for my personal labour in preparing charcoal account will be made at the rate of two annas per bag. The money should be set off against the sum advanced. In case more money is taken by me as an advance in respect of my wages I bind myself to work under you till that amount is paid off. Till all your money is paid off as above I bind myself to work under you. If owing to any cause I give up your work and go away, you are fully empowered to proceed against me under Act 13 of 1859."

The charcoal burners—it has been calculated and not disputed—would under this contract earn Rs. 37 8-0 by ten months work with the aid of their families: whereas they would have to spend during the same period about Rs. 225 for their own support and that of their families. The contractor has been said to have made special arrangements for providing them with food and unfortunately also with drink. But it would appear that the expenses of these items have all been scrupulously and regularly debited to their account. He has however stated that the balance which would, under the arrangement, inevitably be due against them at the end of each year could be wiped off provided they returned to work with him the following year. They have had accordingly to return to work for him during the last six or seven years. They have however on this particular occasion been tempted to break away by a better offer, and the consequence has promptly resulted which would in similar circumstances have happened during any of the past six or seven years. The balances due against them have not been wiped off and they have been directed to work as usual upon the same disadvantageous terms or in default to be sent to jail under the provisions of Act 13 of 1859.

The charcoal burners have been described as "ignorant Kathodis"; and, again, as members of "the improvident and half barbarian tribe like the Kathodi" by the learned Magistrate. The contractor, on the other hand, would appear to be a well-to-do forest contractor. There could be, in my opinion, no doubt in these circumstances, that the relations subsisting between the parties were such that one of the parties was in a position to dominate the will of the other, and there could, in my opinion, also be no doubt whatever, upon a consideration of the terms of the contract, that the transaction was unconscionable. The contractor was therefore bound by law to prove that the contracts were not induced by undue influence. No such proof has been pointed out to us, and the result must follow that the contracts would be liable to be avoided or broken as contracts obtained by undue influence under Ss. 16, and 19A, Contract Act. If so, it could

not, in my opinion, properly be said that the contracts have been broken without lawful or reasonable excuse. The charcoal burners had the lawful right to break the contracts. They could not be said, in the circumstances, to have left the contractor without reasonable excuse. They have no doubt been wilfully broken, but that would not be enough. They must also have been broken without lawful or reasonable excuse as provided by S. 2, Act 13 of 1859. It is only in such circumstances that the contractor has been given a right to have recourse for the enforcement of his contracts to the criminal Courts, and that has for a number of years been the view of Benches of this Court.

G.P./R.K. *Rule made absolute.*

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## A. I. R. 1919 Bombay 140

HEATON AND SHAH, JJ.

*Chandulal Ranchhod* In re.

Criminal Revn. Appl. No. 14 of 1919, Decided on 11th April 1919, against conviction and sentence passed by City Magistrate, 1st Class, Ahmedabad.

**Criminal P.C. (5 of 1898), Ss. 488 and 489 —Decree for restitution of conjugal rights after maintenance order nullifies order—No application under S. 489 is tenable though decree not executed.**

Where wife obtains an order against her husband under S. 488 and subsequently thereto the husband obtains a decree against the wife for restitution of conjugal rights, such decree determines and puts an end to the order of maintenance notwithstanding the fact that the husband does not execute the decree and continues to pay the maintenance. The wife in such a case is not in a position to make an application under S. 489 of the Code. [P 140 C 2]

*H. V. Divatia*—for Applicant.

*G. N. Thakor*—for Opponent.

**Heaton, J.**—This is in form an application under S. 489, Criminal P. C., by a wife who, in the year 1910, obtained an order under S. 488 for maintenance from her husband. She asked for an increased allowance and that was granted; and now the husband has applied to us in the exercise of our revisional powers. The facts we have to deal with are these: order under S. 488 was made in 1910. In 1912 the husband obtained a decree against his wife for restitution of conjugal rights. That decree was never executed. The wife has never, since 1910, lived with her husband and the husband has continued to pay without objection the allowance directed by the Magistrate's order of 1910. These, as the case is presented to us, are undisputed facts. It seems to me that the decree of 1912 did, as a matter of law, determine or put an end to the Magistrate's order under S. 488, and for this simple, but to me convincing, reason. The decree for restitution of conjugal rights is a statement by a Court of matrimonial jurisdiction that husband and wife are under an obligation to live together and that the wife has no right to live apart from her husband. The Magistrate's order of 1910 was in law a statement that the wife had a right to live apart from her husband: but, of course, in the nature of things, any order made by a Magistrate in the exercise of the limited powers conferred on Magistrates by Ch. 36, Criminal P. C., is subject to the orders of civil Courts exercising matrimonial jurisdiction. For it is those latter Courts, and and they alone, that have the power to say finally what are the legal relations between the husband and the wife. A Magistrate under Ch. 6, Criminal P. C., is granted a very limited power for the sake of convenience and that only. Therefore it seems to me that the wife was not in a position to make a proper application under S. 489, because there was no subsisting order under S. 488. However, in all the circumstances of the case, we have to come to the conclusion that the Magistrate should treat the application nominally under S. 489 as an application made by the wife under S. 488. The Magistrate should hear any further evidence that may be offered and what arguments are offered, and then determine, in the light of the circumstances at or about the date of the applition, whether the wife is or is not entitled to an order for maintenance under S. 488, and if she is, what the amount of that maintenance should be. The proceedings should be returned to the Magistrate for this purpose. We set aside the order which the Magistrate has made.

**Shah, J.**—I agree.

G.P./R.K. *Order set aside.*

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## A. I. R. 1919 Bombay 141

SCOTT, C. J.

*Paremeshwaribai Nagesh Ganpaya* — Defendant—Appellant.

v.

*Raghavendra Chidanand Kaikini* — Plaintiff—Respondent.

Second Appeal No. 506 of 1917, Decided on 9th July 1918, from decision of Dist. Judge, Kanara, in Appeal No. 133 of 1915.

**Hindu Law—Alienation—Widow—Consent of next reversioner—Alienation confers absolute title on alienee.**

The consent to an absolute alienation by a Hindu widow or other female of the person or persons constituting the next reversion on the death of such female makes the alienation binding upon the person who eventually succeeds to the estate.

A Hindu died leaving him surviving his mother, his sister and his sister's daughter. The mother succeeded to the estate and conveyed it to the plaintiff's father for the benefit of the sister's daughter and her husband, the plaintiff. Subsequently the sister consented to the alienation and resigned her rights in favour of the alienee:

*Held*: that the alienation conferred an absolute title on the alienee. [P 142 C 1]

*S. V. Palekar*—for Appellant.

*Nilkanth Atmaram* and *S. M. Kaikini*—for Respondent.

**Judgment.**—The plaintiff sues for possession of immovable property of which the owner prior to 1901 was Shantmurti.

On his death his near relations were Laxmi his mother, the defendant his sister, and Padmavati his sister's daughter. The defendant was living an immral life with a paramour and was outcaste. On 3rd March 1903, Laxmi who had succeeded to her son's property made it ever to Chidanand, father of the plaintiff, for the benefit on their attaining majority, of Padma and the plaintiff who had been selected as her bridegroom. In consideration of the handing over of the property Chidanand agreed to pay (1) a debt of Rs. 100 due to one Radhabai on a deed passed by Shantmurti, (2) the marriage expenses of Padma, (3) the obsequies of Laxmi on her death and certain anniversary and other ceremonies. On 19th July in the same year the defendant, reciting the document of 3rd March 1903 and the marriage of her daughter Padma to the plaintiff, stated that in accordance with Shantmurti's wishes Laxmi had given the property into Chidanand's possession on behalf of Padma and the plaintiff and that the arrangement being proper she (the defendant) agreed to it and if she possessed any rights over the property, resigned them in favour of Chidanand. Padma died in 1911 and Laxmi then in conjunction with the defendant disputed the plaintiff's right to the property. Padma's husband, as the surviving beneficiary, now sues to recover the property of which the defendant has got possession. The defendant in her written statement alleged that the plaintiff's father, after obtaining a deed of gift from her mother, came to defendant and told her he had obtained a document from her mother so that her daughter, who was plaintiff's wife, would get the property on her (defendant's) death, that her consent was necessary in law, and he would get her maintenance also, that she consented, and that accordingly he obtained from her a document called a release deed and passed to her a deed of maintenance but it was never acted on.

It was contended at the hearing that the defendant's consent had been obtained by fraud and misrepresentation. This issue was found against the defendant. The plaintiff obviously had a good title as against Laxmi, since the deed was by a Hindu mother as heiress of her son for consideration. For the defendant however it is argued that the release executed by her does not operate to bar her claim as heiress of Shantmurti on the death of Laxmi, which occurred before suit. The learned Judge in the lower appellate Court held that as the life-holder and the reversioner joined together to confer a title on a third person, the title so conferred was an absolute one. The answer of the appellant's pleader to this line of reasoning is that the reversioner's right is only a spes successionis and as she had not then inherited, the defendant released in July 1903 what was not transferable property: that in this Presidency the consent of reversioners to a widow's alienation does not combine with an acceleration of the reversioners' interest to vest an absolute estate in the transferee but is only rebuttable evidence of the propriety of the widow's alienation and that the assent of a Hindu female reversioner is worthless. For this last proposition reliance was placed on dicta in *Varjivan Rangji* v. *Ghelji Gokaldas* (1) and

(1) (1880-81) 5 Bom. 563.

*Vinayak* v. *Govind* (2). In the first of these cases Sir Charles Sargent observed:

"At all events, there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindu law *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (3). In the present case the plaintiffs, although distant heirs, were the heirs presumptive of Narotam at the time of the sale, entitled to succeed in the event of Vakhat dying before her mother without issue, and, as such, clearly interested in disputing the sale. Nor can the mere concurrence of Bai Vakhat, albeit the nearest in succession, (having regard to the state of dependence in which all women are supposed by Hindu law to have their being) be regarded as affording the slightest presumption that the alienation was a justifiable one."

The concluding remarks were quoted by Sir Lawrence Jenkins, in *Vinayak* v. *Govind* (2) as justifying the Court in holding that the consent of the nearest reversioner, if a woman, was unnecessary, and therefore the consent of the female reversioner's son Venkatesh, was sufficient to validate the widow's alienation. The son Venkatesh, who predeceased the alienating widow, was held bound by his assent and the plaintiff as his son was held similarly bound. Ranade, J., put it expressly on the ground of estoppel. In the present case, as has been shown, the issue has been tried whether the consent of the defendant was not obtained by fraud and misrepresentation and it has been found that the consent was not so obtained. The facts therefore seem to negative the presumption, which, Sir Charles Sargent thought, would arise in the case of a female's consent. It is well established that the consent to an absolute alienation by a Hindu widow or other female of the person or persons constituting the next reversion on the death of such female will be binding upon the person who eventually inherits. This result has been assigned to the operation of one or other of two doctrines: one being that a widow may relinquish her estate in favour of her husband's heirs for the time being, and if so, she may combine with the next heir to effect any alienation of the entire estate which they agree to make; the other being that the consent to a widow's alienation of the person or persons constituting the next reversion raises a presumption that the transfer was for legal necessity or that the transferee had made proper and bona fide inquiries and had satisfied himself of the existence of such necessity. Sepeaking generally, the first mentioned doctrine has been adopted in the Calcutta and Madras High Courts and the second in the Bombay High Court: the first was affirmed by the Privy Council in *Behari Lal* v. *Madho Lal Ahir Gayawal* (4) and the second in *Sham Sundar Lal* v. *Achhan Kunwar* (5). The two doctrines were stated and considered by the Privy Council in the later case of *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (6), when neither was expressly repudiated or approved and the conclusion seems to be, as stated by Mookerjee, J., in *Debi Prosad Chowdhry* v. *Golap Bhagat* (7), that both doctrines are well founded on principle. The latest Privy Council decision has special significance for the purposes of the present case, for there as here, the consent of the next reversioners was not contemporaneous with, but sometime subsequent to the woman's alienation. Their Lordships however considered that circumstance immaterial for "*Omnis ratihabitio retrotrahitur et mandato priori aequiparatur.*" The act of transfer is thus treated as an act authorized by the reversioner as a principal, a result which can only be arrived at by acceptance of the Calcutta doctrine of renunciation and accleration by a female combining with an actual alienation by the next heir. The Privy Council held that the claimants were bound by the consent of the reversioners whose sons they were. In the present case a fortiori the defendant is bound by her free consent. It has the effect of validating as an absolute alienation the act of her mother. This conclusion is, I think, supported by the following remarks of Sir Charles Sargent in *Varjivan Rangji* v. *Ghelji Gokaldas* (1):

"As Bai Vakhat's interest. . . was contingent on her surviving her mother, which she failed to do her joining in the conveyance could (if at all) only operate to give validity to it as importing the concurrence of the then nearest. . . heir. . . to the alienation."

He there appears to recognize that the consent given by the nearest reversioner who actually inherits would be binding.

(2) [1901] 25 Bom. 129.
(3) [1869-70] 13 M.I. A. 209=12 W.R. 47 (P.C.).
(4) [1892] 19 Cal. 236=19 I. A. 30 P.C.).
(5) [1899] 21 All. 71=25 I. A. 183 (P.C.).
(6) [1908] 11 O. C. 78=35 I. A. 1 (P.C.).
(7) [1913] 40 Cal. 721=19 I. C. 273 (F.B.).

In my opinion the plaintiff is bound by her release. I affirm the decree and dismiss the appeal with costs.

G.P./R.K. *Appeal dismissed.*

## A. I. R. 1919 Bombay 143

HEATON AND SHAH, JJ.

*Behramsha Ratanji* and *another*—Applicants.

v.

*Emperor*—Opposite Party.

Criminal Revn. Appln. No. 383 of 1918, Decided on 24th January 1919, from convictions and sentences passed by City Magistrate, First Class, Ahmedabad.

**Petroleum Act (8 of 1899), 15-A—Manager and servant of company licensed to store petrol—Receiving petrol from third person not licensed and storing it—They are not bound to enquire how third person obtained it—They are not guilty of abetment.**

The accused *A* and *B* were the manager and servant of a firm holding a license for storing petrol, who undertook to receive and store petrol for *C* (also an accused in the trial Court). Several drums of petrol were consigned to the firm from various places by *C* and were received and stored by *A* and *B*. *C* had no license to deal in petrol and he was convicted of importing, transporting and possessing petrol without a license. *A* and *B* were convicted for having abetted him. *C* appealed to the Sessions Judge and *A* and *B* moved the High Court.

*Held*: that in storing the petrol the firm in no way infringed the law, as they were under no obligation to inquire whether or not *C* had received the petrol in a licensed or unlicensed way, and that therefore *A* and *B* had committed on offence. [P 143 C 2]

*H. V. Divatia*—for Applicants.

*S. S. Patkar*—for the Crown.

**Heaton, J.**—We are much obliged to the Government Pleader in this case for the pains he has taken to make us acquainted with the prosecution view of the matter. He was not originally instructed to appear but the Magistrate's judgment presented so much difficulty to us that we asked him to look into the papers of the case and put before us the case for the prosecution. That case appears to be this: Accused 1, who is a trader in Ahmedabad, finding that the price of petrol had risen in February 1918 and being anxious to make a profit out of this rise in price, took to dealing in petrol. He had himself no license either for the import or transport or possession of petrol. So he entered into an arrangement with Cama Brothers, of whom accused 2 is representative, that they were to receive for him and store for him the petrol that was sent to Ahmedabad to his name. Thereafter he sold some petrol of his that was in the custody or possession of Cama Brothers. He also imported from Rajkot eleven drums which were sent covered by a railway receipt in the name of accused 1's firm which was taken possession of in Ahmedabad and stored by Cama Brothers. He also transported in a similar way a quantity of petrol from Ranpur to Ahmedabad. It is quite immaterial for the purposes of the point which we have to consider to trouble either about the quantities or the dates. It suffices for our purpose to assume that the transport and import by accused 1 was contrary to the provisions of the Petroleum Act.

All the three accused were tried by the First Class Magistrate in Ahmedabad, accused 1 for the commission of the offences of transporting, importing and possessing without a license and accuseds 2 and 3 for abetting him in so doing. They were all convicted. The sentence inflicted on accused 1 was an appealable sentence. He has appealed and his appeal is still pending before the Sessions Judge of Ahmedabad. The sentences inflicted on accused 2 and 3 were not appealable. So they have applied to us in our revisional capacity to set aside the sentences.

We assume for the purposes of this case that accused 1 has been rightly convicted, and we further assume that accuseds 2 and 3 dave done all the physical things which the prosecution allege that they have done. The case turns entirely on what was their intention. It would be a perfectly legitimate thing for Cama Brothers or any one else with a proper license to store petrol which had been sent to Ahmedabad in the name of and for the accused 1. Cama Brothers had a proper license and in storing petrol they were not in any way whatever breaking the law so long as they did not exceed the quantity which they were licensed to store or possess. It is not alleged against them that they did exceed this quantity. They were under no obligation to inquire whether accused 1 had received the petrol in a licensed or an unlicensed way. That was no business of theirs any more than it was the business of the railway company, when they carried the petrol, as they did in this case, to inquire whether the person transporting it had or had not the necessary license. On the facts alleged, more-

over, it is quite clear to my thinking that we must assume that Cama Brothers were ignorant that the law was being deliberately broken and we must continue so to assume, unless definite circumstances are established from which it must be reasonably inferred that Cama Brothers were in collusion with Parikh Brothers, i. e., the firm of accused 1; or at least that they knew that in storing accused 1's petrol they were helping him to deal in petrol which he had obtained by illegal means, i. e, by importing or transporting without a license. The only particular reason which is given for inferring that Cama Brothers were colluding with Parikh Brothers and did know that the petrol was obtained by methods deliberately contrary to the provisions of the law is that they have not given an entirely frank account of their part in the affair.

It may be that they have not, though on the Magistrate's judgment I am not sure that even that can be said. Unfortunately when matters come before a Magistrate, it very commonly happens that people do not give a frank explanation of the circumstances although the true circumstances may be, as far as they are concerned, perfectly innocent. So it seems to me that there are not any circumstances proved which do definitely suggest that Cama Brothers were acting in collusion with accused 1 for the purpose of evading the law. Indeed, if I had to conjecture one way or the other, I should be disposed to conjecture that they were not conscious that the law was being intentionally evaded. I think the Magistrate has in some way been misled by the idea that there was something fraudulent in the case. Now there was nothing at all which was fraudulent in the ordinary sense of that word. Accused 1 may have been guilty of importing and transporting petroleum without a license and he may have been very properly convicted. (As to that we do not express any opinion whatever.) But so far as the evidence discloses the circumstances, he did not act in any fraudulent way. He acted perfectly openly. Not so much as if trying to evade the law clandestinely but as if openly defying the law. For he had the petroleum sent by railway, covered by a railway receipt in his own name, so that everything which it was necessary to discover as against him was made patent. If once this idea of fraud, of something clandestine or deceitful, is eliminated, and I think it must be eliminted in this case, there really remains no reason that I can see for supposing that Cama Brothers were acting in anything but a perfectly straightforward, natural and businesslike way. I do not wish to be understood to suppose that because a man has acted openly and not fraudulently, he may not have acted contrary to the law. I am assuming that accused 1 did act contrary to the law and that he has been rightly convicted.

The case is, if anything, even weaker on the point of possession than it is in the matter of transport and import. It is said that accused 1 was for the purpose of the Act in possession of the petroleum which was actually on the premises of and under the control of Cama Brothers who have a license. I will not say anything as to whether in such circumstances accused 1 could be rightly convicted of possession, because that is a point for the Sessions Judge of Ahmedabad to decide. But it seems to me that by no stretch of ingenuity can Cama Brothers be said to have abetted acused 1 in being in possession against the law of this petroleum unless, of course, it were clearly established that there was a conspiracy between Cama Brothers and accused 1 for the purpose of evading the law. As I have already explained, such a conspiracy is not suggested by the evidence and circumstances of the case. Even if it were, I should still be very doubtful whether Cama Brothers could be said to abet the unlawful possession by accused 1 of petrol.

I have dealt with the case at quite considerable length, because it seems to me to be a case of some importance. I think the Magistrate has so used the law, in this case, as to show that there is a very real danger that perfectly legitimate business operations may be obstructed and rendered difficult by applying a law like the Petroleum Act with a stringency that was never intended. I think that when assumptions are made, in what appear to be ordinary business transactions, that there is an intention to defeat the law, those assumptions need to be based on something substantial. If too readily made, they will have the effect of impeding perfectly legitimate business.

I think therefore that in the case of these two applicants Behramsha Ratanji accused 2 and Vanmali Devchand accused 3 the convictions must be set aside and the fines, if paid, refunded.

**Shah, J.**—I agree.

G.P./R.K. *Conviction set aside.*

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## A. I. R. 1919 Bombay 145

SCOTT, C. J. AND HAYWARD, J.

*Morarji Gokuldas & Co.*—Plaintiffs—Appellants.

v.

*Asian Commercial Assurance Co. Ltd.*—Defendants—Respondents.

Original Civil Appeal No. 14 of 1918, Decided on 9th January 1919, against Decision of Beaman, J.

**Bombay Rent Act (2 of 1918), S. 2 (c)—Lessee of premises entitled to recover rent is landlord within S. 2.**

A lessee of premises who is entitled to recover rent for the premises falls within the terms of the definition of "landlord" in S. 2 (c).

[P 145 C 2]

*Weldon* and *Desai*—for Appellants.

*Strangman* and *Kanga*—for Respondents.

**Scott, C. J.**—As a result of negotiations which commenced in December 1917, the plaintiffs took a lease from Sir Mahomed Yusuf of his premises in Church Gate Street consisting of a four-storied house, on 6th of February 1918. By the lease the plaintiffs become entitled to the premises for 20 years, at a rent of Rupees 6,500 per annum for the first ten years and Rs. 7,000 for the second ten years with an option of renewal for another seven years at the same rent, and by the lease they acquired the benefit of all subsisting tenancies. Their object in taking the house was to utilise the fourth floor as an office for their firm. At the date of the lease it was held by the defendants on a monthly tenancy and the plaintiffs arranged with Sir Mahomed Yusuf to give notice to quit on 31st March to the defendants as the plaintiffs' tenure was to commence on 1st of April. Accordingly such notice to quit was given to the defendants on 18th of February. They did not however quit at the commencement of the plaintiffs' tenure. Therefore they were not in lawful occupation of the fourth floor. They were trespassers. On 10th of April the Bombay Rent Act (2 of 1918) came into force and on the same day the plaintiffs filed this suit for possession of the fourth floor. The defendants contend that under the Rent Act they cannot be ejected. They rely upon S. 9, which so far as material is as follows:—

'No order for the recovery of possession of any premises shall be made so long as the tenant pays or is ready and willing to pay rent to the full extent allowable by this Act and performs the conditions of the tenancy: Provided that nothing in this section shall apply . . . where the premises are reasonably and bona fide required by the landlord either for the erection of buildings or for his own occupation. . . . "

The plaintiffs reply that the premises are reasonably required by them for their own occupation. The learned Judge, after a consideration of the evidence adduced by the plaintiffs, held that it would be unwarrantable to throw the slightest suspicion upon the honesty of their motives in taking the lease of 6th February, by which I understand him to mean that although they had not made out a very strong case of inconvenience in their former premises, they did bona fide require the fourth floor for their own occupation. It seems to me that on this point there can hardly be two opinions. The plaintiffs are paying to their lessor for a long term a rent much higher than that he was already receiving and this, coupled with their evidence as to the inadequacy of their present office accommodation, convinces me that they reasonably and bona fide require the fourth floor for their own occupation. It is indisputable that the plaintiffs fall within the terms of the definition of 'landlord' in the Rent Act, S. 2 (c), for they are the persons entitled to recover rent for the premises. The learned Judge, however held that their lessor did not require to occupy the premises, and therefore could not by assigning a reversion to the fourth floor confer the right to claim to occupy that portion of the house. Whether that argument would be tenable if the landlord had assigned his reversion after the Act came into force is a question which does not arise in this case, for the landlord had parted with his rights for 20 years and the defendants' tenancy had determined before the Act came into force and I find it impossible to hold that the Act has any retrospective force in limiting the operation of prior transfers. The plaintiffs were the 'landlords' when the Act came into force and I cannot find in S. 9 or in any other part of the Act anything to prevent them from exercis-

ing the rights reserved to landlords by S. 9 (2).

The defendants, besides relying on the provisions of the Rent Act, contended in their written statement that they are entitled to specific performance of a lease of the fourth floor from Sir Mahomed Yusuf for five years. Their evidence, however negatives any such claim. It shows that they had a lease prepared and stamped to take the fourth floor from Sir Mahomed Yusuf in November 1917 for five years at Rs. 200 per month, but owing to some conversation with Sir Mahomed Yusuf's agent they abandoned the idea of a lease and agreed to pay Rs. 175 per month on the understanding that they would not be evicted. Assuming the story of the promise or understanding that there would be no eviction is true, it cannot prejudice the plaintiffs who admittedly had no notice of any such understanding. The defendants may have some right of action against Sir Mahomed Yusuf but they have no defence to the plaintiff's claim for possession under his registered lease. A further point was made that the plaintiffs were not entitled to sue as the firm of Morarji Gokuldas & Co., includes Sir Dinsha Wachha who is not a party plaintiff. That gentleman has deposed that though a partner he has no interest in the financial side of the firm or in the lease in question. He is indeed a salaried partner only not interested in the assets and therefore not a necessary party to a suit such as this. We set aside the decree of the lower Court and pass a decree for the plaintiffs for possession as prayed—Rupees 165 per mensem from 1st April 1918 till delivery of possession as compensation for use and occupation—with costs throughout on the defendants.

G.P./R.K. *Appeal decreed.*

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## A. I. R. 1919 Bombay 146

SCOTT, C. J. AND HAYWARD, J.

*Bai Kanku*—Appellant.

v.

*Bai Jadav*—Respondent.

Second Appeal No. 1129 of 1915, Decided on 10th April 1919, from decision of Dist. Judge, Broach, in Appeal No. 4 of 1915.

**(a) Hindu Law — Widow — Reversioner—Decree against widow challenged on ground of absence of fair trial—Burden of proof is on reversioner.**

In a suit by a reversioner on the death of a widow, in which he challenges the binding nature of a decree against the widow, the onus is on him to prove that there has not been a fair trial of the right in suit. [P 147 C 1]

**(b) Hindu Law—Widow—Decree—Decree on admission—Decree is not binding on reversioner.**

Where a decree is passed against a widow on a ground personal to herself, and which would not have been passed but for an admission made by her, her admission is not binding upon her reversioner. [P 148 C 1]

**(c) Civil P. C. (1908), O. 23, R. 3—Effect of withdrawal of appeal is to make decree final.**

The withdrawal of an appeal has the effect of making the decree appealed against final.

[P 147 C 2 ; P 148 C 1]

*G. S. Rao*—for Appellant.

*Coyajee* and *H. V. Divatia*—for Respondent.

**Scott, C. J.**—This is a suit by a reversioner to redeem a mortgage created by a Hindu widow Bai Bonji. The original mortgage was in 1854. It was for the debts of the husband of Bonji. It was renewed in 1857 for the existing debts and certain further debts contracted by this widow. The latter mortgege is that in question in this suit. It contained among other provisions a Gahan Lahan clause that if the money was not paid within a year, the mortgagee should become the owner. In 1865 a suit was filed by the widow Bonji to redeem the mortgage. It was dismissed by the Munsif, on the ground that the plaintiff had admitted in 1859, in a deposition given in a suit filed by the mortgagee against a tenant, that the mortgagee had become owner of the property by the operation of the Gahan Lahan clause. For this reason the Munsif did not apply to the case the decision in *Ramji* v. *Chinto* (1) decided in the previous year by the Bomby High Court, to the effect that notwithstanding a Gahan Lahan clause the dectrine 'once a mortgage always a mortgage' prevails in this Presidency. Against the Munsif's decision an appeal was filed, but it was not heard, as before the hearing it was recorded as "adjusted." Bonji died in the year 1902. The reversioner sued within twelve years of her death for redemption. The defendant mortgagee contends that the right of redemption is gone, and relies on the decree in the suit of 1865 in support of the plea of res judicata. That a decree against a widow in relation to her husband's property may bind reversioners is well

(1) [1862-65] 1 B. H. C. R. 199.

established, provided certain conditions exist. The leading case is *Katama Natchiar* v. *Rajah of Shivagunga* (2). The doctrine applicable to the present suit is to be found at p. 603 of that volume in the following passgge;

"It seems however to be necessary, in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the decree of 1847, if it had become final in Anga Mootoo Natchiar's lifetime, would have bound these claiming the zamindary in succession to her. And their Lordships are of opinion that, unless it could be shown that there had not been a fair trial of the right in that suit —or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit in the Zillah Court by any person claiming in succession to Anga Mootoo Natchiar. For assuming her to be entitled to the zemindary at all, the whole estate would for the time be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by decree fairly and properly obtained against the widow."

It would appear from these remarks that the onus is on a reversioner challenging the conclusive nature of the decree against the widow on whose death he claims to prove that there has not been a fair trial of the right in suit. The question arises owing to the appeal filed by the widow, whether the termination of the suit in the manner in which it was disposed of can operate to bind the plaintiff. It is argued that the widow appealed, relying upon the decision of the Bombay High Court in the case of *Ramji* v. *Chinto* (1) and the inconclusive nature of her previous admission, and that, then, without apparent cause she abandoned the appeal. It is contended, as was found by the learned Judge in the trial Court, that Bonji cannot reasonably be said to have fairly and honestly contested the right and taken the steps necessary to protect the estate of which she was in charge for the time being as a Hindu widow. The learned Judge of the lower appellate Court has however considered the effect of the withdrawal of the appeal, and his finding is expressed in the following paragraph:

"There was no allegation in the pleadings that the withdrawal of the appeal was due to fraud, collusion, or compromise, and there is no legal proof either. It would be profitless to speculate as to the cause of the withdrawal. It was suggested that the first Court having in its judgment stated that Bonji had perjured herself, she must have got frightened lest the Court of appeal should sanction her prosecution, if it came to hear the appeal. But this is mere conjecture and conjecture, however wellfounded, cannot be accepted as legal proof. It was also suggested that as the property was worth considerably more than the amount raised on it, and as the Munsif's decision was manifestly wrong, Bonji was unlikely to have withdrawn the appeal unless it was made worth her while to do so. But this, again, is mere suspicion which, though it may be well founded cannot be acted upon. I therefore find that it is not shown that the withdrawal of the appeal was due to fraud, collusion or compromise."

He therefore held that the withdrawal of the appeal had the effect of making the decree of the first Court final, and as that decree was fairly and properly obtained in a suit contested up to decree, it fulfilled the conditions of the rule laid down in the *Shivagunga's* case (2) as amplified in the later cases. The later cases material to this point are *Hari Nath Chatterjee* v. *Mothurmohun Goswami* (3) in which the daughter who represented the estate in a litigation had been negligent in applying for leave to appeal in forma pauperis against a decree which had been passed against her, and it was held that the dismissal of her application, with the result that she was unable to appeal at all for want of funds, was binding upon the reversioners. The case can only be put on the ground that the negligence of the person representing the estate may be relied upon by the opposite party for the purpose of barring the right of a reversioner subsequently to agitate the point which it was in the power of the negligent party to have had tried out in appeal. Other and later cases are *Ghelabhai* v. *Bai Javer* (4), very similar to the present case, and *Risal Singh* v. *Balwant Singh* (5), the passage chiefly in point being at p. 179 (*of* 45 *I. A.*).

Being bound in second appeal to accept the finding of fact of the learned Judge of the lower appellate Court, which has been above set forth, I am of opinion that on that basis the learned Judge was right in holding that the withdrawal of the appeal has the effect of making the decree

(2) [1862-63] 9 M. I. A. 539=2 Sar. 25 (P. C.).

(3) [1894] 21 Cal. 8=20 I. A. 183=6 Sar. 334 (P. C.).

(4) [1913] 37 Bom. 172=17 I.C. 866.

(5) A.I.R. 1918 P.C. 87=40 All. 593=45 I.A. 168=48 I.C. 553 (P.C.).

of the first Court final. The learned Judge however did not decide the case against the plaintiff, for he held that the decree in the Munsif's Court was given against the widow on a ground personal to herself inasmuch as the Munsif would not have so decided but for her admission and that her admission in the litigation could be no more binding upon the reversioner than an alienation by her of her equity of redemption otherwise than for necessity. The question is whether the learned Judge is right in this conclusion.

In my opinion he is right. The suit was decided by the Munsif on the ground that notwithstanding the decree in *Ramji* v. *Chinto* (1), which had established for gahan lahan mortgages the principle of "once a mortgage always a mortgage", the widow Bonji was concluded by an admission in a previous deposition to the effect that the mortgagee had become the full owner by operation of the gahan lahan clause. Such a decision cannot be rested on the doctrine of estoppel, for the mere admission of the widow in a deposition raised no estoppel although the Munsif seems to have treated Bonji as estopped from pleading that the equity of redemption remained in her. It was not an estoppel binding on Bonji's representatives, assuming that the reversioners of her husband can in the circumstances be treated as her representatives. The suit was dismissed in consequence of an unguarded statement by Bonji which could affect no one but herself. The plaintiff's case can therefore be put at least as high as that of the reversioner in *Braja Lal Sen* v. *Jiban Krishna Roy* (6), where a suit by a widow to set aside a sale had been dismissed mainly on the ground that the sale had been confirmed with the consent of the widow given upon receipt of Rs. 2,040 by her and the learned Judges Maclean, C. J., and Banerjee, J., said that having regard to the ground of dismissal, it would not be right to hold it a bar to the reversioners' claim. The only remaining question therefore is whether the suit is barred by limitation. Here again I think the learned Judge is right, for if the enquity of redemption was only suspended during Bonji's lifetime, the reversioner being within sixty years would, even according to the Limitation Act of 1859, Cl. 15 be within time. The decree of the lower Court must be affirmed and the appeal dismissed with costs.

(6) [1899] 26 Cal. 285.

**Hayward, J.**—The plaintiffs sued defendants to redeem a possessory mortgage, dated 22nd December 1857. It was executed by the widow of the last male holder and contained a "gahan lahan" clause providing that the mortgagee should in default of due payment of the loan become owner of the property. It was admitted by the widow on 21st October 1859 in proceedings between the mortgagee and the tenants that the mortgagee had under the "Gahan Lahan" provision become owner of the property. She nevertheless sought some years later to repay the loan, Rs. 2,300, and redeem the property valued at Rs. 13,000, but her suit was on the strength of her previous admission dismissed on 31st October 1865. It was however conceded in the judgment that otherwise the "gahan lahan" provision would not have had the effect of making the mortgagee the owner of the property in view of the decision in *Ramji* v. *Chinto* (1). The widow appealed on the grounds that she was not bound by her admission in other proceedings and that the decision was directly opposed to the ruling in *Ramji* v. *Chinto* (1). The appeal was filed on 30th November 1865, but was withdrawn on payment of costs on 23rd January 1866. It was endorsed "adjusted" on 3rd February 1866. No further procedings were taken and the widow died in 1902. The representatives of the reversioners brought the present proceedings for redemption against the representatives of the mortgagee in 1911. There was no question as to the propriety of mortgage, nor on the other side was it disputed that the debt had long been liquidated out of the profits of the property. The substantial questions were whether the reversioners were bound by the decree against the widow and whether they were barred by limitation.

The Subordinate Judge came to the conclusion that the reversioners were not bound as there had not been a fair trial of the right of the reversioners within the ruling in the *Shivagunga's* case (2) in that the widow had compromised the appeal. He thought the widow could not "under the circumstances be reasonably said to have fairly and honestly contested the right and taken the steps

necessary to protect the estate of which she was in charge for the time being as a Hindu widow." The District Judge came to the same conclusion but by a more direct route. He considered that "the ground on which Bonji's (the widow's) suit was dismissed was her admission that the breach of the "gahan lahan clause had made the mortgagee owner" and that it was thus "dismissed on a ground personal to herself," and did not bar the reversioners. He considered that it was "not shown that the withdrawal of the appeal was due to fraud, collusion or compromise" and that "the case must be dealt with as if no appeal had been preferred." He thought that the ruling in the *Shivagunga* case (2) did not support the proposition that "where the decree appears to be manifestly wrong, it is the widow's duty to appeal from it, and if she fails to do so, or having appealed fails to press the appeal to a decision she shall be considered to have failed in her duty to protect the estate and the decree in that case will not bind the reversioners." It would seem therefore that he held that there had not been a fair trial of the right of the reversioners quite apart from what happened to the appeal. Both the Subordinate Judge and the District Judge held the reversioners were not barred by limitation.

We have therefore these established facts. The loan of Rs. 2,300 on mortgage of property worth Rs. 13,000 was permitted by the widow, on an admission extracted from her in other proceedings in direct opposition to the equitable rule "once a mortgage always a mortgage" recognized in *Ramji* v. *Chinto* (1), to result in the enlargement of the mortgagee's interest into full ownership without dispute in appeal. It seems to me impossible for us to say on these established facts that there was no justification for the view that there had been no fair trial of the right of the reversioners within the ruling in the *Shivagunga's* case (2) : the view held notwithstanding some difference of opinion as to what happened to the appeal by both the lower Courts. It seems to me that this case and indeed every other of this nature must be decided on its own particular merits. The admission of the widow here was apparently without consideration and without legal necessity. It was inconclusive and it would seem to have been insufficient even to bind her own limited interest in the equity of redemption. It was obviously ineffectual to transfer the important interest therein of the reversioners. The behaviour of the widow and the widow's interest were the subjects mentioned in the judgment. There was no reference whatever to the important interest of the reversioners. There was in effect a trial only of the right of the widow. There was not a fair trial, indeed there was no trial of the right of the reversioners. It seems to me that would be sufficient to exclude the trial from the rule in the *Shivagunga* case (2) without going further and establishing fraud in the withdrawal of the appeal. It has somewhat similarly been held that suits against the widow for arrears of rent or maintenance chargeable to the estate were personally against the widow and did not involve the rights of the reversioners. There was no necessity therefore in those suits to establish fraud. They were *Nugenderchunder Ghose* v. *Sreemutty Kaminee Dossee* (7) and *Baijun Doobey* v. *Brij Bhookun Lall Awusti* (8). It has also somewhat similarly been held that suits in which arbitration awards or compromises have been accepted by the widow would, quite apart from the fraud, not bind the reversioners. These have been detailed at pp. 92 to 94(*of* 38 *I A*) *Khunni Lal* v. *Gobind Krishna Narain* (9). These rulings were there held inapplicable (at p. 103 of 38 *I. A.*) but were not disapproved by their Lordships of the Privy Council. It would seem therefore that if there should be no real trial of the rights of the reversioners it would be unnecessary to establish fraud to exclude the trial from the rule in the *Shivagunga's* case (2).

If there should be a real trial of the rights of the reversioners the effect would of course be nullified by proof of fraud. But there must be a real trial of the rights of the reversioners and there must also be freedom from fraud in order to provoke the rule in the *Shivgunga's* case (2). Such was not the case here. There was no practical trial of the rights

(7) [1866] 11 M. I. A. 241=2 Sar. 275 (P.C.).
(8) [1875] 1 Cal. 133=2 I. A. 275=3 Sar. 541 (P.C.).
(9) [1911] 33 All. 356=38 I. A. 87=10 I. C. 477 (P. C.).

of the reversioners and there was no necessity to establish fraud. This case was therefore distinguishable from those of *Jugul Kishore* v. *Jotendro Mohan Tagore* (10), *Hari Nath Chatterjee* v. *Mothurmohun Goswami* (3) and *Risal Singh* v. *Balwant Singh* (5). It has moreover to be remembered that, as pointed out in the last mentioned decision the rule is a special rule applicable to the peculiar position of limited holders under Hindu Law, and not the general and strict rule of res judicata prescribed by S. 11, Civil P. C. of 1908. This special rule has to be applied with due regard to the peculiar precautions necessary in this country to prevent the exercise of pressure over limited female holders to the prejudice of the rights of reversioners. The rule has therefore not to be interpreted with reference to the strict rules regarding fraud and irregularities required to invalidate decrees otherwise binding under the general law of procedure.

It seems to me that the question of limitation has also been decided rightly by the lower Courts. The suit by the widow affected only her own right to redeem, and did not, in view of what has been said, affect the right of the reversioners. They had 60 years to redeem under S. 15, Act 14 of 1859, and their right would not have become barred in any case either under that Act or Act 9 of 1871 by reason of S. 2, Act 15 of 1877. But, as a matter of fact, they brought their suit within 12 years of the death of the widow and within 60 years of the mortgage, and their right to redeem would not therefore be barred either by Art. 144 or Art. 148, of the Schedule to the Limitation Act, 1908.

G.P./R.K. *Appeal dismissed.*

(10) [1884] 10 Cal. 985=11 I. A. 66=4 Sar. 553 (P. C.).

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## A. I. R. 1919 Bombay 150

HEATON AND PRATT, JJ.

*Syed Yacoob Syed Lallamian*—Accused—Applicant.

v.

*Emperor*—Opposite Party.

Criminal Revn. Appln. No. 283 of 1918, Decided on 13th November 1918, from an order passed by the Second Presidency Magistrate, Bombay.

**(a) Criminal P. C. (5 of 1898), S. 106—Accused convicted under S. 504, I. P. C., can be asked to furnish security.**

A breach of the peace or a probable breach of the peace being an ingredient of the offence made punishable by S. 504, I. P. C., it is not illegal to direct a person convicted under that section to furnish security to keep the peace under S. 106. [P 151 C 1,2]

**(b) Criminal P. C. (5 of 1898), S. 106**—(Per *Heaton, J.*)—**"Other offences involving breach of peace," explained.**

Per *Heaton, J.*—The words "other offences involving a breach of the peace" in S 106, are applicable where there actually has been a breach of the peace, and also where the definition of the offence involves a breach of the peace. [P 151 C 2]

Per *Pratt, J.*—The phrase "other offences involving a breach of the peace" includes offences which are offences because a breach of the peace has occurred or because a breach of the peace is likely to occur. [P 150 C 2]

*Munshi* and *M. B. Dave*—for Accused.

*S. S. Patkar, Government Pleader* and *E. F. Nicholson, Public Prosecutor*—for the Crown.

**Pratt, J.**—The applicants in this case have been convicted of offences under Ss. 341 and 504, I. P. C., and further applicant 1 has been ordered under S. 106, Criminal P. C., to furnish security for keeping the peace. The application for revision in regard to the convictions and sentences has not been pressed, and in regard to applicant 1 it is contended that the order for security is illegal as the offence which he has committed under S. 504, is not one which involves a breach of the peace. In my opinion, the phrase "other offences involving a breach of the peace" includes offences which are offences because a breach of the peace has occurred or because a breach of the peace is likely to occur. This is consistent with the cases of *Jib Lal Gir* v. *Jogmohan Gir* (1), *Baidya Nath Majumdar* v. *Nibaran Chunder Gope* (2), *Kannookaran Kunhamad* v. *Emperor* (3), *Raj Narain Roy* v. *Bhagabat Chunder Nandi* (4), and *Abdul Ali Choudhury* v. *Emperor* (5), where it was held that the offence under S. 143, I. P. C., of unlawful assembly does not necessarily involve a breach of the peace. This is so, for the common object of the unlawful assembly may not be to commit a breach of the peace. I do not agree with the

(1) [1899] 26 Cal. 576.
(2) [1909] 30 Cal. 93.
(3) [1903] 26 Mad. 469.
(4) [1908] 35 Cal. 315.
(5) [1916] 43 Cal. 671=34 I. C. 361.

decisions in *Arun Samanta* v. *Emperor* (6) and *Kannookaran Kunhamad* v. *Emperor* (3) that offences which are likely to lead to a breach of the peace are excluded. This is contrary to the decision in *Jib Lal Gir* v. *Jogmohan Gir* (1) that the Court

"should be satisfied that the acts do involve a breach of the peace or an evident intention of committing the same."

Of course a breach of the peace or a probability of a breach of the peace must be an ingredient of the offence. A breach of the peace must be the common object of the unlawful assembly in a conviction under S. 143, I. P. C., or the intention of the accused in a conviction under S. 448, I. P. C.: *Subal Chunder Dey* v. *Ram Kanai Sanyasi* (7). S. 106 could not be applied after a conviction for defamation, although the person defamed was provoked to commit a breach of the peace, for that is something beyond the scope of the offence charged. But in regard to S. 504, I. P. C., it is clear that a breach of the peace or a probability of a breach of the peace is an ingredient of the offence. For insult is not an offence unless it is given with the intention or knowledge that it would be likely to provoke the breach of a peace. I am fortified in this construction by the fact that S. 106 also includes the offence of criminal intimidation. It would be remarkable if the section justified security in the case of language used with the intention of causing alarm and not language with the intention of provoking a breach of the peace. I would accordingly discharge the Rule.

**Heaton, J.**—I agree that the Rule should be discharged. We have from time to time had a good deal of argument as to the meaning of the words "other offences involving a breach of the peace" which occur in S. 106, Criminal P. C., and at last we have determined to record what we have to say in relation to these words as they apply to the particular case before us. It seems to me that they are difficult words to construe, and there is no doubt that their meaning has been differently interpreted by different Judges at different times. I have a pretty clear view of my own as to what the words mean and why they are used. But I do not profess to suppose that my particular view will be accepted at any rate by the majority of other Judges, because the words are so illusive that they must of necessity attract different interpretations from different minds. To my thinking the words cover at any rate two classes of cases. They may cover more, but I am quite satisfied in my own mind that they cover two classes of cases. The first class of cases is where there actually has been a breach of the peace, not where it has been intended merely or been likely to occur, but where in fact it has occurred. That is one class. The other class is where the definition of the offence involves a breach of the peace, as it does in one of the two classes of cases which occur under S. 504. There, insult as a criminal offence is defined. One class of cases is where the insult is perpetrated with the intention or knowledge that it is likely to give provocation which will cause another person to break the public peace; the other class is where it is perpetrated with the intention or knowledge that it is likely to provoke another person to commit some other offence.

Now in the kind of case we are dealing with the result was an offence. It was perpetrated with the intention or knowledge that it would be likely to cause a breach of the peace. So the determination of what is an insult in this case involves a determination of what is a breach of the peace. You cannot do the first without the second. You cannot decide that the insult is punishable under S. 504 unless you know what you mean by the words "breach of the peace." And where that is so, I think that the words in S. 106 have operation. The case we are dealing with is a case of that type. Therefore I think the Rule should be discharged. I only wish to mention one other point. I have said nothing about what actually constitutes a breach of the peace, and that is a matter that also is very frequently argued. It is questioned whether in order to reach what is known as a breach of the peace you have to go so far as to inflict blows. One view is that you must go that length. The other view is that you may have a breach of the peace long before you come to the infliction of blows. This view contemplates that the mere assembling of men for a criminal purpose is a breach of the peace and that the mere use of language, if it is violent enough, is a breach of the peace. But on

(6) [1903] 30 Cal. 366.
(7) [1898] 25 Cal. 628.

this topic I do not wish to express any opinion, because to do so is not necessary for the purposes in hand.

G.P./R.K. *Rule discharged.*

## A. I. R. 1919 Bombay 152

PRATT, J.

*Nathmal Ghamirmal*—Plaintiff.

v

*Maniram Radhakisson*—Defendant.

Original Civil Suit No. 456 of 1918, Decided on 22nd March 1919.

**(a) Civil P. C. (5 of 1908), S. 73 and O. 21, R. 55—Money paid to remove attachment cannot be rateably distributed.**

Money paid under R. 55, O. 21, Civil P. C., to remove an attachment is not subject to rateable distribution, and is payable only to the attaching creditor. [P 153 C 1]

**(b) Civil P. C. (5 of 1908), S. 73—S. 73 applies to money realised by process of execution.**

S. 73, Civil P. C., is restricted in its application to assets held by the Court which were realised or obtained by process of execution. [P 153 C 2]

*Inverarity*—for Plaintiff.

*Mulla*—for Defendant.

**Judgment.** — The judgment-creditor in this case applies for payment of the money received by the Sheriff under a warrant of attachment issued in execution of the decree in Suit No. 456 of 1918. The prothonotary refused to issue an order in Form No. 64, holding that the money was an asset available for rateable distribution. The judgement-creditor had taken out a warrant in Form No. 48 for attachment of the moveable property of the judgment-debtor under O. 21 R. 43. The bailiff entered the judgment debtor's shop and showed the warrant to a partner in the judgment-debtor's firm and pointed out that if the money were not paid he would seize and keep in his custody the moveable property in his shop. The judgment-debtor then paid the decretal amount with costs of execution and Sheriffs' poundage. The question is whether this amount is available for rateable distribution among the other judgment-creditors who had made previous execution applications.

Section. 295, Civil P. C., 1882 has been considerably enlarged under S. 73 of the present Code. The former referred to assets "realized by sale or otherwise in execution of a decree," and the latter refers to "assets held by a Court." The phrase "assets realised by sale or otherwise" was construed in the case of *Purshottamdass Tribhovandass* v. *Mahant Surajbharthi Haribharthi* (1) to be assets which have been realized from the property of the judgment-debtor by sale or otherwise. The words "or otherwise" were explained in the judgment by reference to Ss. 291 and 305—equivalent to O. 21, Rr. 69 and 83—that is where money is paid to stop a sale or is raised by private alienation to set aside a sale. This decision was based on the position of S. 295, Civil P. C., where it appeared under Ch. 19 of the Code dealing with execution of decrees and under the sub-division to that chapter referring to sale and delivery of property. As a result of this construction it was held that moneys paid by a judgment-debtor under arrest in full satisfaction of the decree were not assets realised in execution by sale or otherwise, because the process of execution had not been directed against the property.

Following this case, it was held in *Gopal Dai* v. *Chunni Lal* (2) and in *Vibudhapriya Tirthaswami* v. *Yusuf Sahib* (3) that money paid to remove an attachment was not within S. 295, as an attachment was not a process of sale or conversion otherwise of property. The correctness of the reasoning in *Purshotamdass'* case (1) seems to have been doubted in *Manilal Umedram* v. *Nanabhai Maneklal* (4), where Sir Lawrence Jenkins explained that the word "realized" implied that property had been converted into or obtained in cash or some other form available for immediate distribution. Hence, if money is paid into Court it is obtained or realised, even though there has been no sale or conversion of the judgment-debtor's property. On this meaning of the word "realised" it was not necessary to limit the words "or otherwise," as Sir Charles Sargeant did in *Purshotamdass'* case (1), to processes of execution ejusdem generis with sale.

I think the amendment in the present Code of Civil Procedure was intended to overrule *Purshotamdass'* case (1) and to provide that all assets held by the Court are available for rateable distribution, by whatever process of execution they may have been obtained. I also think that the assets must have been obtained in execution. The reference to costs of

(1) [1881] 6 Bom. 588.
(2) [1886] 8 All. 67.
(3) [1905] 28 Mad. 380.
(4) [1904] 28 Bom. 264.

realization and the position of the section in the Code at the end of Part 2 on execution seems to me to lead irresistibly to this conclusion. This was also the view taken by Bakewell, J., in *Suikeena Katun* v. *Mahomed Abdul Aziz* (5). The asset therefore, must be something obtained in execution in a form available for distribution among the judgment-creditors. Under S. 73 therefore I think it necessary to establish (1) that the money is an asset held by the Court, and (2) that it has been realised or obtained in execution.

To turn now to the present case, there is no doubt as to the first point that the money is an asset held by the Court. As to the second point it is argued that it has not been realised in execution as the warrant of attachment was not in fact executed. This seems to me to be a mere quibble. It matters not whether the property was actually taken into custody by the bailiff or not. Physical contact, it may be noted, is not necessary to actual seizure under O. 21, R. 43: *Multan Chand Kanyalal* v. *Bank of Madras* (6); see also *Bissicks* v. *Bath Colliery Co.* (7). The warrant directed a seizure and after seizure, release of the goods from custody if the judgment debt was not paid. This, I take it, is what happened, and in any event the money was paid under stress of the warrant. The warrant is a process of execution and it was the warrant that procured the payment of the money.

If the matter were res integra, I should hold that the money was an asset held by the Court and realized in execution, and therefore, liable to rateable distribution. But it has been held in *Sorabji Coovarji* v. *Kala Raghunath* (8) that the money paid to remove an attachment under O. 21, R. 55, is not subject to rateable distribution, the reasoning being (1) that the money was not realized in process of execution, and (2) that rateable distribution would nullify the provisions of R. 55. The first ground follows the cases decided on the words "sale or otherwise," which are held to mean sale or other process of execution provided for in the Civil Procedure Code—*Sew Bux Bogla* v. *Shib Chunder Sen* (9), *Prosonnomoyi Dassi* v. *Sreenanth Roy* (10) and *Vibudhapriya Tirthaswami* v. *Yusuf Sahib* (3). But these cases all followed *Purshotamdass'* case (1) in restricting the process to one of sale or conversion of the property, and I venture to doubt whether this is not too restrictive a construction under the amended section in which the words "sale or otherwise" have been dropped and in which there is merely an implication that the assets should have been realized or obtained in execution proceedings. I also venture to doubt the correctness of the second reason. O. 21, R. 55, operates effectively where there is one decree-holder. If there are a number of decree-holders, there is no scope for the rule, for the judgment-debtor has no motive for paying off one judgment-creditor when the same property is liable to be re-attached by the others. To allow one decree-holder to paid off in full when the property is insufficient to discharge other judgment-debts might possibly be undue preference and defeat the object of the section which is equal distribution of all the moneys received in execution. Again, why should a judgment-creditor, whose attachment has been removed under O. 21, R. 55, be in a better position than a judgment-creditor who has taken the trouble of bringing the property to sale? Lastly, if the money paid under O. 21, R. 55, to remove an attachment is not available for rateable distribution, then a fortiori money paid to stop a sale under O. 21, R. 83, would also not be so available. But even under the old section it was assumed by Sir Charles Sargent in *Purshotamdass'* case (1) that money paid to stop a sale is available for rateable distribution. So that the interpretation put upon the section in *Sorabji Coovarji* v. *Kala Raghunath* (8) makes the new section more restrictive than the old one, and this is not what the legislature intended.

I agree with the decision in *Thiraviyam Pillai* v. *Lakshmana Pillai* (11) that money paid under R. 55 is an asset held by the Court and is, like the money paid, to stop a sale under R. 83 available for distribution. But I differ from the case, in that I think that S. 73 is restricted to what is paid into Court by virtue of process of execution.

(5) [1915] 38 Mad. 221=29 I. C. 239.
(6) [1904] 27 Mad. 346.
(7) [1878] 3 Ex. D. 174.
(8) [1911] 36 Bom 156=12 I. C. 911
(9) [1886] 13 Cal. 225.
(10) [1894] 21 Cal. 809.
(11) [1918] 41 Mad. 616=47 I. C. 538.

I have ventured to express my opinion as to the construction of the section, but feel bound to follow the decision in *Sorabji's* case (8) and I therefore direct the prothonotary to issue the payment order in Form No. 64. This order should not be issued for three weeks pending an appeal. The attaching judgment-creditor's costs, including the costs of the previous application to be costs in the execution. The other judgment-creditors to pay their own costs.

G.P./R.K. *Order accordingly.*

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## A. I. R. 1919 Bombay 154

MARTEN, J.

*Govind Laxman Gokhale*—Plaintiff.

v.

*Harichand Mancharam*—Defendant.

Original Suit No. 1456 of 1917, Decided on 1st February 1919.

**Contract — Construction — Agreement for sale of immovable property—Bargain paper to be prepared by vakil — Certain amount agreed to be paid at time of preparation of bargain paper and balance of time of execution of sale deed—Bargain to be cancelled under certain circumstances — Agreement held not to be concluded contract but merely agreement to enter into contract and thus not specifically enforceable — Specific performance.**

Defendant agreed in writing to sell certain immovable property to the plaintiff for a certain price. One of the conditions of the agreement was as follows: "The bargain paper for the sale of the said immovable property shall be made through a vakil within two days from this date and at the time of making the bargain paper I am to take from you by way of earnest money in respect thereof Rs. 10,000, that is to say, you are to pay the same to me and as regards rupees two lacs and five thousand, being the balance, you are to pay the same to me at the time of the execution of the sale deed by me." Another clause referred to certain suits pending against the defendant and provided that if those suits were decided against him the bargain was to be cancelled and the deposit returned:

*Held*: that the condition as to the execution of the bargain paper prevented the agreement from operating as a concluded contract and that the document being merely an agreement to enter into a contract could not be specifically enforced. [P 156 C 1]

*Jinnah, Kanga* and *Moos*—for Plaintiff.

*Davar, Inverarity* and *Strangman*—for Defendant.

**Judgment.**—This is an action for specific performance of an alleged contract dated 28th November 1917 for the sale by the defendant to the plaintiff of a property at Grant Road for Rs. 2,15,000. The defence is that there was no concluded contract, but merely an agreement to enter into a contract, which in law amounts to nothing. The point is that in the document sued on, there is a reference to a further document being executed, and the question is whether that reference prevents the document sued on being an enforceable contract. The document sued on is in duplicate, but as each duplicate is in the first person, the words of each part are not precisely the same. There are also some other differences in the precise wording of the two duplicates which I will consider later on. Both duplicates are in Gujarati. Taking the duplicate Ex. A, signed by the defendant, it ran thus:

"To Govind Laxman Gokhale. Given in writing by Harichand Mancharam. To wit. What is written is as follows: I agree to sell you for rupees two lacs and fifteen thousand my immovable property near Play House at Grant Road."

Then follows a formal description of the property. Then the document proceeds:

"The conditions in respect thereof are as follows: (1) The bargain paper for the sale of the said immovable property shall be made through a vakil within two days from this date and at the time of making the bargain paper I am to take from you by way of earnest money in respect thereof Rs. 10,000, that is to say, you are to pay the same to me, and as regards rupees two lacs and five thousand, being the balance, you are to pay the same to me at the time of the execution of the sale deed by me."

Then Cl. 2 refers to certain suits in the High Court pending against the defendant, the vendor, and that if those suits are decided against him, the bargain is to be cancelled and the deposit returned. Then Cl. 3 provides for sharing the costs of the sale equally. Cl. 4 deals with the completion of the sale and fixes it at six months from the date of the bargain paper. Then it proceeds:

"On the decision in the case being given in my favour during the said period, I am to get passed marketable titles for you and to complete the matter of sale. If perchance the suits pending in the High Court are not disposed of within six months, then this agreement shall be in force till the disposal of the said suits and on the said suit being decided in my favour, I am to complete the matter of this sale; and if the High Court suits be decided in my favour within six months, I am to complete and you are to get completed the matter of sale within six months."

Then Cl. 5 provides for the vendor getting the signature of a certain adopted son along with the vendor's signature on the sale deed. Cl. 6 says that the defendant has not to pay brokerage. Then the document concludes:

"I have given and have taken from you the agreement to the above effect of my and your free will and pleasure."

Then follows the date, 28th November 1917, and the signature of the defendant. What happened afterwards was that the defendant's solicitors prepared a draft contract in English, but that eventually the parties did not agree on its terms and consequently this suit was brought. It should be observed that the plaintiff's solicitors, Messrs. Khanderao, Laud and Metha, in entertaining and altering this draft contract, were particularly careful to do so without prejudice to their client's rights under the existing document, Ex. A, which they contended was a binding agreement: see their letters of 30th November and 3rd December 1917. Turning then to the document sued on, Ex. A, the defendant relies on Cl. 1 and he says that the reference to a bargain paper prevents any contract being arrived at until that bargain paper has been executed. He also relies on what is perhaps a preliminary point, namely, that there is a slight difierence in the wording between the two duplicates, Ex. A and Ex. A-1, and that that difference either prevents an agreement being arrived at, or alternatively shows that there was to be no bargain unless and until it was arrived at in a vakil's office.

As regards what I have called the preliminary point, I do not think there is any substantial difference between the two duplicates. In particular, as regards Cl. 1, I think it immaterial that the second sentence speaks in Ex. A of "bargain paper" and in Ex. A-1 of "bargain." I think therefore that the preliminary point fails and that it is immaterial which duplicate is used. I accordingly come to the main question, viz., whether the document Ex. A is a contract, or is in law nothing. Questions of this description arise very frequently in England and the case on either side of the line depend on rather fine distinctions of wording. Consequently, any particular case may well give rise to difference of opinion. Speaking generally the authorities say that in each case the question is one of construction of the particular document as to what was the intention of the parties. These authorities include judgments of such eminent Judges as Lord Blackburn, Sir George Ressel and Lord Parker, and one cannot do better than quote what they say. In *Rossiter* v. *Miller* (1) Lord Blackburn at p. 1152 said as follows:

"Parties often do enter into a negotiation meaning that, when they have (or think they have) come to one mind, the result shall be put into formal shape, and then (if on seeing the result in that shape, they find they are agreed) signed and made binding; but that each party is to reserve to himself the right to retire from the contract, if, on looking at the formal contract, he finds that though it may represent what he said, it does not represent what he meant to say. Whenever, on the true construction of the evidence, this appears to be the intention, I think that the parties ought not to be held bound till they have executed the formal agreement. I think the decisions settle that it is a question of construction whether the parties finally agreed to be bound by the terms though they were subsequently to have a formal agreement drawn up."

In *Winn* v. *Bull* (2) Sir George Jessel said:

"I take it the principle is clear. If in the case of a proposed sale or lease of an estate two persons agree to all the terms and say we will have the terms put into form' then all the terms being put into writing and agreed to, there is a contract. If two persons agree in writing that up to a certain point the terms shall be the terms of the contract, but that the minor terms shall be submitted to a solicitor, and shall be such as are approved of by him, then there is no contract, because all the terms have not been settled."

Then at p. 32 he said:

"It comes therefore to this: that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail."

In *Von Hatzfeldt Wildenburg* v. *Alexander* (3) Parker, J., (as he then was) said at p. 288 as sollows:

"It appears to be well settled by the authorities that 'if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract, either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored. The fact that the reference to the more formal document is in words which according to their natural con-

(1) [1878] 3 A. C. 1124.
(2) [1878] 7 Ch. D. 29.
(3) [1912] 1 Ch 284.

struction import a condition is generally, if not invariably, conclusive against the reference being treated as the expression of a mere desire."

I do not think it necessary to go through the other English authorities, but I may quote what Lord Cranworth says in *Ridgway* v. *Wharton* (4), viz.:

"I again protest against its being supposed, because persons wish to have a formal agreement drawn up, that therefore they cannot be bound by a previous agreement, if it is clear that such an agreement has been made; but the circumstance that the parties do intend a subsequent agreement to be made is strong evidence to show that they did not intend the previous negotiations to amount to an agreement"

I may also state that of later authorities Kekewich, J., in *Lloyd* v. *Nowell* (5) and Joyce, J., in *Watson* v. *McAllum* (6) both arrived at similar conclusions to Parker, J., in *Von Hatzfeldt Wildenburg* v. *Alexander* (3), viz. that there was no contract. The latter case of *Watson* v. *McAllum* (6) is fairly near the present one. Two Indian authorities, *Koylash Chunder Doss* v. *Tariney Churn Singhee* (7) and *Whymper & Co.* v. *Buckle & Co.* (8), were cited to me, and they rely on the same principles as the English authorities

Now applying to Ex. A, the principles laid down in the above judgments, I think the words "the conditions in respect thereof are as follows" are important, and that it is also important that the first of the conditions referred to is for a bargain paper through a vakil. The reference to the more formal document (viz., the bargain paper) is therefore a "condition," and according to Lord Parker, that fact is

"generally, if not invariably, conclusive against the reference being treated as the expression of a mere desire."

Further, I think there was a special reason here for the parties requiring the services of a vakil before they were to be finally bound. That reason was the situation with reference to the two High Court suits which was a peculiar one, and which Cls. 2 and 4 of Ex. A might not entirely meet. Then, too, I think it is in favour of the defendants that the earnest money was to be paid on the execution of the bargain paper and not on the execution of Ex. A. Counsel for the plaintiff argued that the reason for the bargain paper was because Ex. A was in Gujarati and the parties wanted a formal document in English. I do not think this was "the" reason. It may perhaps have been a reason amongst others, and even if so, I am by no means satisfied that it points to the parties being finally bound by the Gujarati document.

I have duly considered the other arguments that were addressed to me on the true construction and effect of Ex. A. In the result I am of opinion and so hold that, on the true construction of Ex. A, and in the events which have happened, there is no binding contract between the plaintiff and defendant. The suit will therefore be dismissed with costs. I should add that if I had been of opinion that there was a binding contract, I could not at this stage have decreed specific performance. The two High Court suits referred to in Ex. A have not yet been tried, and it depends on their result whether the defendant has anything to sell. At most therefore I could have made a declaration as to the existence of a binding contract, and adjourned the remaining issues till after the decision of the two suits. In his reply, counsel for plaintiff admitted that this view was correct and expressed his willingness to abide by it. I answer the formal issues as follows:

(1) Whether the suit is maintainable having regard to the fact that the writing sued on was conditional upon an agreement being entered into?—*A*. No. (2) Whether there was a concluded contract between the parties and if so, what are the terms thereof?—*A*. No. It is unnecessary to answer the remaining issues.

G.P./R.K. *Suit dismissed.*

(4) [1857] 6 H. L. C. 238.
(5) [1895] 2 Ch. 744.
(6) [1908] 87 L. T. 547.
(7) [1907] 10 O. C. 588.
(8) [1881] 3 All. 469.

## A. I. R. 1919 Bombay 156

HEATON AND SHAH, JJ.

*Abu Hasan*—Accused—Applicant.

v.

*Emperor*—Opposite Party.

Criminal Revn. Appln. Nos. 396 and 397 of 1918, Decided on 12th February 1919, against order of City Magistrate, Surat.

**(a) Defence of India Consolidation Rules (1915), Rr. 21-A, 28 and 30—Written consent of authority mentioned in R. 30 is essential for conviction under rules.**

A person cannot be convicted under the Defence of India Consolidation Rules of 1915, without the written consent of the authority mentioned

in R. 30 of the rules to initiate proceedings against him. [P 157 C 2]

**(b) Defence of India Consolidation Rules (1915), Rr. 21-A and 28—In search by police everything ready for melting sovereigns found—Conviction held justified.**

The shop of accused 1 was raided by the police who found a furnace ready heated, and on it a crucible containing molten silver and near it a large number of sovereigns in an open dish or receptacle so placed as to be ready for transfer to the crucible : he was convicted of attempting to melt sovereigns under Rr. 21-A and 28, Defence of India Consolidation Rules 1915. On revision to the High Court :

*Held* : that he had been rightly convicted. [P 158 C 1, 2]

**(c) Defence of India Consolidation Rules (1915), Rr. 21-A, 28 and 30—Sanction for prosecution of one person—Offence not mentioned—Conviction of other person jointly held illegal—Omission to mention offence did not vitiate conviction.**

*A* and *B* were tried and convicted of offences under Rr. 21-A and 28, Defence of India Consolidation Rules, 1915. It was found that the consent in writing required by R. 30 authorised proceedings against *A* alone and that it did not specify the offence for which he was to be tried :

*Held* : (1) that *B*'s conviction was illegal and must be set aside ; (2) that the defect in the consent did not invalidate the proceedings as regards *A*. [P 157 C 2]

*Jinnah, A. D. Sabnis, Binning* and *P. B. Shingne*—for Applicant.

*Strangman* and *S. S. Patkar*—for the Crown.

**Heaton, J.**—We are hearing these matters in revision ; but, as well as the point of law, we have had the evidence laid before us. It is a prosecution under the Defence of India Consolidation Rules of 1915. Under R. 21-A of those rules it is made an offence to melt any current gold coin. It is urged against accused 1 that he attempted to melt a number of sovereigns, and it is conceded that if he did attempt to melt sovereigns he is guilty under this rule together with another rule which penalizes attempts. It is provided by R. 30 that "no Court shall take cognizance of any offence punishable under these rules" unless certain authorities, amongst whom is the District Magistrate, have "by order in writing consented to the initiation of the proceedings." We have in this case the order in writing which purports to be the consent to the initiation of the proceedings, and that document recites that, in the exercise of the authority vested in him by R. 30, the District Magistrate of Surat hereby consents to proceedings being initiated against Memon Abu Hasan of Surat in the Court of the First Class Magistrate of Surat. The nature of the proceedings is not stated in the order. Memon Abu Hasan is accused 1 in the case.

After proceedings had been initiated against him, it transpired that there was another man, accused 2 in the case, who, it is alleged, abetted the offence by providing the sovereigns. It is claimed for him that there is no consent in writing to any proceedings against him. That, I think, is so. He might be got at, it seems to me, at most in only two ways, either by entering his name in the written consent, but that was not done, or possibly, (I will not say certainly) by describing the offence in the written consent and thereafter showing that he was concerned in that particular offence. But this has not been done either. There is no offence described in the consent in writing, and the name of accused 2 is not mentioned, therefore it seems to me that accused 2 must be acquitted for the reason that I have stated that the proceedings against him have not been consented to in writing. This is a great deal more than a merely technical matter. We are dealing with an act which has been made an offence by certain rules which are temporary in their nature and are made to meet a special emergency. It is specially provided that there must be consent in writing for the initiation of proceedings. This is intended as a real safeguard and it must be given full effect to. That has not happened in this case as regards accused 2. This rule about a consent in writing is as I read it intended to be an undertaking by the Government that no one shall be prosecuted unless his case has been considered by one of the authorities named. This has to be shown by a consent in writing. There is no guarantee here that the case of accused 2 received any consideration whatever from the District Magistrate. Therefore to uphold his conviction would cause a breach of an undertaking given by the Government. To that we cannot possibly consent.

It is urged also that the consent in writing does not properly cover even the case of accused 1. We think however that it does cover his case because he is named and from what happened contemporaneously with the grant of this consent there is no doubt that the nature

of the proceedings to be initiated was known and understood, so that the omission of mention of them in the document does not render that document inoperative as regards accused 1. But I must say that the document is very carelessly drawn up and further that proper care and attention ought to be given to these matters by the responsible officers. I will now turn to the facts. It was proved to the satisfaction of the trial Court and of the Court of appeal that when the police raided the shop of accused 1, they found a furnace ready heated and on it a crucible containig molten silver and near it a large number of sovereigns in an open dish or receptacle so placed as to be ready for transfer to the crucible. It is contended that these facts are not established by the evidence and in particular that it is not shown that there was a crucible on the furnace with molten silver in it. No doubt that fact was disputed before the trial Magistrate and evidence was recorded before him to show that there was no crucible. The Magistrate however found that there was a crucible with molten silver in it and when the matter came up in appeal before the Sessions Judge, he recorded in his judgment:

"It is admitted that when the shop of accused 1 was raided, a furnace was found burning with a crucible on it containing molten silver."

If that circumstance was admitted before the Court of appeal I feel no hesitation whatever in accepting it as a fact sitting here as a Court of revision. The facts therefore are as stated in the judgment of the Sessions Judge, and what those facts mean beyond any doubt to my mind is this: that the sovereigns were there for the purpose of being melted and that the crucible with the molten silver on it was there for the purpose of having those sovereigns or some of them placed in it. The only point that remains, then is to consider whether this does amount to an attempt to melt these sovereigns or some of them. It seems to me that it does. I will take a case that has been referred to *Queen-Empress* v. *Luxman* (1). It is stated that Sir Lawrence Jenkins described an attempt in these words:

"An attempt is an intentional preparatory action which fails in its object; which so fails through circumstances independent of the person who seeks its accomplishment."

We have another view of what an attempt is stated in the case of *Emperor* v. *Chandkha Salabatkha* (2), in which at p. 555 (of 37 *Bom.*) there is a quotation of what Blackburn, J. said that

"if the actual transaction has commenced which would have ended in the crime if not interrupted there is clearly an attempt to commit the crime."

The transaction in this case comprised the heating of the furnace, the placing of the silver in the crucible the placing of the crucible with the silver in the furnace the lapse of time required to melt the silver and finally the depositing of the sovereigns in the crucible containing the molten silver. The whole of this somewhat complicated and by no means brief transaction had been accomplished except the final act of putting the sovereigns into the molten silver in the crucible. That in my judgment shows and clearly shows that there was an attempt to commit this offence. Therefore I think that accused 1 was rightly convicted.

But I think that having regard to the circumstance that the melting of coin was formerly not at offence and we are told formerly not uncommon and that it has been made an offence by special rules of a temporary character to meet a special purpose and that so far as we know, this is the first case of the kind in these parts—certainly the first case that has come before us—we think that the punishment need not be so severe as that which has been imposed. We therefore change the sentence of imprisonment to imprisonment for that period which accused 1 has already undergone and we leave the sentence of fine unchanged. Accused 2 is acquitted and the fine, if paid must be refunded.

**Shah, J.**—I agree.

G.P./R.K. *Order accordingly.*

(1) [1900] 2 Bom. L. R. 286.

(2) [1913] 37 Bom. 553=20 I. C. 611.

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## A. I. R. 1919 Bombay 158

HEATON AND PRATT, JJ.

*Devappa Ramappa Naik*—Accused—Applicant.

v.

*Emperor*—Opposite Party.

Criminal Revn. Appln. No. 343 of 1918, Decided on 19th December 1918, against order of Dist. Magistrate, Kanara.

**(a) Workman's Breach of Contract Act (1859), S. 2—Contract to cart logs of wood from forest to forest depot is not one by workman.**

A contract to cart logs of wood from a forest to a forest depot is not a contract of an artificer

workman or labourer within the meaning of the Workman's Breach of Contract Act. [P 160 C 1]

**(b) Criminal P. C. (1898), Ss. 435 and 439 —High Court can revise order under Workman's Breach of Contract Act (1859), S. 2(1).**

The High Court has power to revise an order made by a Magistrate under the first part of S. 2, Workman's Breach of Contract Act, directing either return of the advance or specific performance of the contract. The power of revision of the High Court under Ss. 435 and 439, Criminal P. C , extends to all proceedings before any inferior Court situate within the local limits of its jurisdiction. The test is not the nature of the proceeding held by the Court, but the nature of the Court in which that proceeding is held.

[P 159 C 1, 2]

*V. R. Sirur*—for Accused.

*Nilkanth Atmaram*—for the Crown.

**Pratt, J.**—This is an application for a revision of an order made by the Second Class Magistrate under S. 2, Workman's Breach of Contract Act (13 of 1859), directing the refund of money advanced. The order of the Second Class Magistrate was made on 9th April 1918 and it was confirmed on appeal by the District Magistrate on 1st August 1918. A preliminary objection is taken that revision by this Court is incompetent and that the application for revision is time barred. Now S. 2, Workman's Breach of Contract Act, is explained in the case of *Emperor* v. *Balu Saluji* (1) as divisible into two parts. The first part is an inquiry into the fact whether a breach of contract has occurred and in the event of the breach of contract being proved, that inquiry concludes with an order directing either return of the advance or specific performance of the contract. The second part is an independent proceeding ensuing on disobedience of the order made on the first part. It is this second proceeding that is penal. For there is no offence unless and until the order made under the first part has been disobeyed. It is on this construction of the section that the preliminary objection is raised that, whereas the order made in this case by the Magistrate is an order under part 1, the proceeding is not of a criminal, but of a civil, nature and therefore not subject to revision by this Court. In my opinion there is no substance in this objection. The power of revision of this Court under Ss. 435 and 439, Criminal P. C., refers to any proceeding before any inferior Court situate in the local limits of our jurisdiction. The test is not the nature of the proceeding held by the Court, but the nature of the Court in which that proceeding is held. Proceedings of a civil nature may be held in a criminal Court, as for instance, applications for maintenance under S. 488, Criminal P. C., and these are subject to revision under S. 435. The legislature evidently considered that proceedings of reference to easements and possession of moveable property, though of a civil nature, may be subject to revision by the High Court, for they have been made the subject of the special exemption enacted in sub-S. 3, S. 439. Further the case of *Chinto Vinayak Kulkarni In re* (2) is a case in which this Court revised an order made under part 1, S. 2, Workman's Breach of Contract Act.

As to limitation : it is true that the appeal to the District Magistrate was incompetent. An appeal lies to the District Magistrate under S. 407, Criminal P. C., only in the case of a conviction. But as the proceeding under S. 2, Workman's Breach of Contract Act, had not reached the stage of part 2 of that section, there had been no offence and therefore no conviction. The period of limitation will therefore run from the date of the order made by the Second Class Magistrate, i. e., 9th April 1918. But the rule of sixty days for revisional applications is not inflexible and, in the circumstances, I think it fair that allowance should be made for the time occupied in the proceeding before the District Magistrate. I would therefore disallow the objections as to limitation and entertain the application on the merits.

To come to the merits : the contract was a contract of cartage under which the applicant engaged to remove 100 logs of wood from a forest to a forest depot, a distance of 22 miles, at a fixed rate of Re. 1-14-0 for every khanday of 13 cubit feet of wood carted. Now the cases show that a contract of this sort is not a contract of an artificer, a workman or a labourer : see *Queen-Empress* v. *Hanma* (3) and *Caluram* v. *Chengappa* (4). Those cases refer to contracts of cartage and proceed on the ground that the contracts did not show that the person contracting to have the work done bound himself to render personal labour. It is sought to distinguish this contract, on the ground

(1) [1909] 33 Bom. 25=1 I. C. 387.

(2) [1900] 2 Bom. L. R. 801.

(3) [1891] Rat. Unrep. Cr. C. 537.

(4) [1890] 13 Mad. 351=1 Weir 691.

that it does include a covenant that the applicant "shall do the work on his own personal responsibility and with his personal labour." But it is admitted even by the complainant that this part of the contract was not to be acted upon. There was no probability or even possibility of the applicant doing personal labour and it was not expected that he should do so. This clause therefore does not operate to confer upon the applicant the status of artificer, workman or labourer. There is a further covenant in the contract that in case of breach it shall be enforced according to the provisions of the Workman's Breach of Contract Act. But an agreement of parties cannot confer jurisdiction, for

"when the Judge has no inherent jurisdiction over the subject-matter of a suit the parties cannot by their mutual consent convert it into a proper judicial process": *Ledgard* v. *Bull* (5).

I would therefore allow the application and reverse the order made by the Second Class Magistrate.

**Heaton, J.**—I agree. Apart altogether from authority, I have no doubt whatever that the applicant does not in consequence of the contract between him and the complainant become an artificer, a workman or a labourer. The work which he undertook to do was the work of a contractor and not the work of an artificer, or of a workman, or labourer.

G.P./R K. *Order reversed.*

(5) [1887] 9 All. 191=13 I. A. 134 (P.C.).

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## * A. I. R. 1919 Bombay 160

HEATON AND SHAH, JJ.

*Murarji Raghunath Gujarati* — Accused—Appellant.

v.

*Emperor*—Opposite Party.

Criminal Revn. Appln. No. 28 of 1919, Decided on 7th April 1919, against conviction and sentence passed by First Class Magistrate, East Khandesh.

*** (a) Penal Code (45 of 1860), S. 420—Price paid in currency notes—Less change paid than due on ground that notes were not worth their face value—No offence under S. 420 held committed.**

Where a customer paid for goods in currency notes and a dispute arose as to the amount of change due to him, the shopkeeper stating that the notes were not worth their face value and in consequence gave less change than was due.

*Held*: that the shopkeeper did not commit the offence of cheating. [P 160 C 2]

*** (b) Criminal P. C. (1898), S. 255—Admission of facts alleged is not necessarily admission of offence.**

Where an accused person admits the facts alleged, such admission does not necessarily amount to an admission of the offence with which he is charged. [P 160 C 2]

*P. B. Shingne*—for Appellant.

*S. S. Patkar*—for the Crown.

**Heaton, J.**—This is a case which is both interesting and important. A customer purchased from a shopkeeper goods the price of which was Rs. 2-13-0 and he tendered in payment two currency notes, one of Rs. 2-8-0 the other of one rupee. The shopkeeper accepted the notes, and the change which apparently he ought to have given was annas 11, but he tendered as change only nine annas and three pies, saying that the notes were not worth their face value and that one anna nine pies was charged by the shopkeeper on that account. At least that is what in substance happened, though of course we cannot be sure from the evidence, what were the exact words used. What happened exactly next we do not know from the evidence. But we know either that the customer complained to a police officer or that the police officer saw what had happened and intervened, for the two notes paid to the shopkeeper were attached; a panchanama was made and the shopkeeper was sent before a Magistrate who, after taking evidence, framed a charge of cheating. The accused pleaded guilty to the charge. He was convicted and sentenced to pay a fine of Rs. 25 and he has applied to this Court in revision. First, I will deal with the plea of guilty. I feel perfectly certain in my own mind that the accused never intended by his plea of guilty to admit more than that the facts alleged against him were true. Whether on those facts he ought to be held to have committed the offence of cheating is really a question of law, as to which the plea of the accused must be considered immaterial. Magistrates sometimes make mistakes of this kind. They think that because an accused person admits the facts therefore he admits that he has committed the offence with which he is charged. This is one of those cases in which the admission of the facts does not amount to an admission of the offence. Therefore I shall proceed to deal with the case as if there were no plea of guilty.

For cheating there must be deceit. In this case, obviously, there was no deceit at all in the earlier part of the transaction. There was a sale of goods after the usual inquiry as to price and there was a tender of the price by the purchaser. So far then there was clearly no deceit. But it is said that the shopkeeper deceived when he stated that the notes were not worth their face value. Whether he said this before or after he had taken the notes into his hands does not appear. But, in substance, it is to my mind perfectly clear that there was no deceit at all. The customer was not induced to hand over the notes by any representation on the part of the shopkeeper that he would get change calculated on the face value of the notes. He handed the notes to the shopkeeper in the ordinary course of the sale and purchase transaction; and what really happened was, that a dispute then arose as to the correct amount of change due to the customer. He claimed 11 annas calculated on the face value of the notes. The shopkeeper said he would give only nine annas three pies, because the notes were not worth their face value. It is, as I judge it, simply a case of a dispute between the shopkeeper and the customer, and in no way whatever a case of deceit, and certainly not a case of cheating. That is the only matter that we have to consider. The case may illustrate the fact that there are economic and financial difficulties about these notes. With that we have nothing to do. We have merely to decide whether the present applicant is guilty of the offence of cheating, and, in my opinion, it is not a matter even of the slightest doubt—I hold that it is perfectly clear—that he never committed the offence of cheating in this matter at all. I think our order should be that the conviction is set aside and that the fine if paid should be refunded.

**Shah, J.**—I entirely agree.

G.P./R.K. *Order set aside.*

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## A. I. R. 1919 Bombay 161

HEATON AND PRATT, JJ.

*Hawaji Sakharam Mahalaskar*, In re.

Criminal Revn. Appln. Nos. 306 and 307 of 1918, Decided on 17th December 1918, to revise orders of Subdivl. Magistrate, First Court, Poona.

1919 B/21 & 22

**Criminal P. C. (1898), S. 528—Order under S. 528 transferring case from one Court to another without notice to other party is not illegal—Question of notice is one of propriety rather than of legality.**

An order under S. 528, transferring a case from the Court of one Magistrate to that of another is not illegal merely because it is made without notice to the other party. The question of notice is one of propriety rather than of legality, and should be decided on the facts of each particular case. [P 161 C 2]

Where a case, which had been pending before a Magistrate for two months and eleven hearings and in which charges had been framed, was transferred on the motion of the accused without notice to the complainant:

*Held*: that the order of transfer was improper and should be set aside. [P 161 C 2]

*V. D Limaye*—for Applicant.

*S. S. Patkar*— for the Crown.

**Pratt, J.**—This is an application for revision of an order of the Sub-divisional Magistrate of Poona withdrawing under S. 528, two cases pending before the Second Class Magistrate of Vadgaon to his own Court and then referring them to trial to the Court of the First Class Magistrate of Khed.

The main ground on which Mr. Limaye rests his application is that these orders of transfer were made without notice to the other party. No doubt the trend of the decisions in this Court appears to have been that an order under S. 528, made without notice is illegal: *Imperatrix* v. *Sadashiv Narayan* (1), *In re Nageshwar Sitaram* (2) and *Vedu Bapu* v. *Bhagwandas* (3). But these cases were doubted in *In re Virji* (4) and I understand that the recent practice of this Court has been to treat want of notice as not amounting to illegality. I confess that is my view. For the section does not require issue of notice and that too is the view of the Allahabad High Court: see *Dukhi Kewat, In the matter of the petition of* (5). The question of notice seems to me to be one of propriety rather than of legality. The question of propriety is one to be decided on the facts of each particular case, and I think here the cases having been pending before the Magistrate for two months and for eleven hearings and charges having been framed, it was improper for the Magistrate to have acted on the application of one party without giving the other party an op-

(1) [1898] 22 Bom. 549.
(2) [1899] 1 Bom. L. R. 347.
(3) [1903] 5 Bom. L. R. 28.
(4) [1904] 6 Bom. L. R 856=1 Cr. L. J. 934.
(5) [1906] 28 All. 421.

portunity of being heard. I would therefore reverse the orders of transfer and direct the Magistrate to rehear the matter after issue of notice to both the parties.

**Heaton, J.**—I concur.

G.P./R.K. *Orders reversed.*

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## A. I. R. 1919 Bombay 162

HEATON AND SHAH, JJ.

*Hira Gobar*—Accused—Appellant.

**v.**

*Emperor*—Opposite Party.

Criminal Appeal No. 436 of 1918, Decided on 10th January 1919, from conviction and sentence passed by Second Presy. Magistrate, Bombay.

**(a) Evidence Act (1 of 1872), Ss. 25 and 26—Statements made to or in presence of police are inadmissible.**

Statements made to a police officer or to a complainant in the presence of a police officer are inadmissible in evidence under Ss. 25 and 26. [P 163 C 2]

**(b) Evidence Act (1 of 1872), Ss. 8, 25 and 26—Statement in nature of confessions made in presence of police are inadmissible to show conduct apart from statements under S. 8.**

Similarly, evidence, which is substantially evidence of the confession of an accused person in the presence of a police officer, is inadmissible as evidence of conduct apart from the accompanying statements under S. 8 of the Act. [P 163 C 2]

**(c) Evidence Act (1 of 1872), S. 8, Expl. (2)—Second explanation does not apply to statements by police in presence of accused.**

The second explanation to S. 8, does not apply to a statement made by a police officer to a complainant in the presence of an accused person. [P 163 C 2]

*Munshi, Thakoredas, T. Parekh* and *J. B. Kapadia*—for Appellant.

*S. S. Patkar*—for The Crown.

**Shah, J.**—In this case three persons were charged with house breaking at night and theft of property worth about Rs. 22,000, said to have been committed in the bungalow of the complainant on the Walkeshwar Road on 11th February last year. The theft and the housebreaking alleged were undoubtedly committed. A part of the property stolen was later on traced to one Moti Narottam residing in the Palanpur territory, and as a result of the investigation that followed upon this tracing of the property, the present accused who belong to the Kaira District, were sent up for trial to the Second Presidency Magistrate. The property which has been traced has been identified and there can be no doubt that the property traced to Moti and the witness Shiva in the case formed part of the property stolen from the house of the complainant. The principal evidence against these three persons was the evidence of the witness Moti Narottam. The learned trial Magistrate acquitted accuseds 2 and 3 on the ground that the evidence of Moti Narottam, who was undoubtedly an accomplice, required independent corroboration and that there was no such corroboration in any material particulars as regards these two accused persons. As to accused 1 the trial Magistrate held that such corroboration was afforded first by the close resemblance between the footprint of accused 1 and the tracing of a footmark which was found on a table in the house of the complainant immediately after the offence; and secondly, by the evidence of Inspector of Police to the effect that the accused 1 pointed out on 5th June the house which he had entered on the night of the offence and the various places in the house connected with the offence and accordingly convicted him.

Accused 1 has appealed to this Court and the points in the appeal relate to the admissibility and sufficiency of the evidence relied upon by the learned Magistrate as corroborating the story of the accomplice so far as it affects the appellant.

I may mention, at the outset, that the general account given by the accomplice appears to me as it appeared to the trial Magistrate to be substantially true, and that under the circumstances, corroboration as to the connexion of the accused with the housebreaking and theft is needed. It is proved in the case that about this time Shiva occupied a house in Khetwadi; that the three accused used to stay with him or to visit him, and that probably they were in Bombay at the time when this theft was committed. But that circumstance does not corroborate the story of the prosecution that the three accused were concerned in the theft on the night of 11th February. In fact, the trial Magistrate has not treated the circumstance in that way as to accuseds 2 and 3 and it is equally ineffective as regards accused 1. The argument in the appeal has mainly ranged round the two circumstances which the trial Magistrate has relied upon as sufficiently corroborating the evidence of the accomplice as to the connexion of accused 1 with the theft. The evidence which

relates to the resemblance of the two foot prints is not sufficient to corroborate the accomplice. A careful comparison of the foot print whith the tracing on the glass does not yield any better result than that the two foot prints may be of the same man. It is impossible to say with any degree of confidence on a comparison of these prints that the mark which was observed on the table in the house of the complainant on the night of 11th was really the mark of the right foot of accused 1. There was some argument as to the admissibility of the evidence of the expert examined on behalf of the prosecution to establish the identity. But it is not necessary to go into that question. Assuming his evidence to be admissible, it is clear that his opinion cannot be accepted as establishing the identity of the appellant as the foot-marks do not coincide with sufficient accuracy. In the course of the argument it was fairly conceded by the Government Pleader that he could not maintain that the two marks were sufficiently identical, and on a comparison of these two marks I have come to the same conclusion. The apparent resemblance between the two marks does not carry the case of the prosecution any further than the evidence of the accomplice.

As to the second item of corroboration which consists of the evidence of the Inspector and the complainant, the question is whether that evidence is admissible. The learned Magistrate is of opinion that it is admissible. I am however unable to agree with the view. In my opinion the evidence taken as a whole shows that it is evidence of a confession of the accused in the presence of a police officer. It is true that in terms it purports to establish that accused 1 pointed out the house and the various places connected with the offence and it is contended that it is really evidence of the conduct of the accused, and that therefore it is admissible under S. 8, Evidence Act. It is clear from the evidence that the real significance of the conduct arises out of the statements made by the accused at the time, and that the conduct, apart from the statements made either expressly or impliedly by gestures by the accused, has very little value. The meaning that was conveyed to the witnesses by what is contended to be the conduct of the accused and not his statements was really conveyed by the statements made at the time when he pointed out the various places. Such statements would clearly be inadmissible under Ss. 25 and 26, Evidence Act as they were made to the police officer or to the complainant in the presence of the police officer. It is common ground that no fact is deposed to as discovered in consequence of the information furnished by the accused and that S. 27, Evidence Act does not apply. I am unable to accept the contention urged by the learned Government Pleader that this evidence, which is substantially evidence of the confession of the accused in the presence of a police officer, can be admitted as evidence of conduct, apart from the accompanying statements, under S. 8.

It is further urged that in any case the statements made by the police officer to the complainant in the presence of the accused that he (the accused) was going to show the various places connected with the theft, would be admissible under Expln. 2, S. 8. I do not think, however that Expln. 2 can apply to the statement made by the police officer to the complainant in the presence of the accused, first because the conduct, apart from the accompanying statements, is not shown to be relevant, and secondly, because under the circumstances such a statement cannot be said to affect the conduct of the accused. For these reasons I am of opinion that the evidence of the Police Inspector and the complainant as to the pointing out of the various places by accused 1 is really evidence of the confession of his guilt made while he was in the custody of the police officer, and is, therefore inadmissible.

In the result, therefore we have the evidence of the accomplice without any material corroboration as to the connection of the appellant with the theft and house breaking. On that evidence the learned Magistrate has rightly refused to convict accuseds 2 and 3 and under the circumstances the accused 1 also is entitled to the same treatment. I am of opinion that the evidence of the accomplice is insufficient to justify the conviction of the appellant on the charge of theft and house-breaking. The conviction and sentence must be set aside and the appellant should be acquitted and discharged.

**Heaton, J.**—I agree. Taking the evidence and circumstances in this case I think it is inevitable that the appellant must be acquitted. He is convicted of theft and, apart from the two matters to which I will allude later on, the evidence of importance in the case is directed to connect him not with the theft, but with the disposal of certain of the stolen property some time after the theft and at places hundreds of miles away from the scene of the offence. The evidence of the approver Moti makes much more certain the connexion of himself and other persons with the stolen property than the connexion of the present appellant and those who were co-accused as thieves with him. The Magistrate very rightly, as I think, found it quite impossible to convict any of these three persons on the strength of Moti's evidence. As regards the present appellant, however he was convicted by reason of the two items of evidence which my learned brother has fully dealt with. As regards the foot-print, all I need say is that after the closest examination and after careful comparison of the outline taken on glass of the foot-print found on the table with the foot-print of accused 1, the present appellant, the result is this. The two may be impressions of the foot of the same person, but it is at least equally possible that they may be the impressions of the feet of different persons. That item of evidence is, therefore absolutely neutral.

As regards the other item, I entirely agree with my learned brother that in this case what the appellant was doing was that he was making a confession to a police officer. But the confession comprised not merely words but gestures, and what is sought to be done is, while not proving the words, to prove gestures and further to prove all that is necessary to give significance to those gestures. But I quite agree that gestures are just asmuch a part of a confession as are the words used. So that item of evidence also must be discarded. Therefore I think the order of acquittal, as I have said in this case is inevitable.

G.P./R.K. *Accused acquitted.*

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## * * A. I. R. 1919 Bombay 164

SCOTT, C. J.

*On difference between*

HEATON AND SHAH, JJ.

*Emperor*

v.

*Sabitkhan Bahadurkhan*—Accused.

Criminal Appeal No. 425 of 1918, Decided on 3rd March 1919, from order of Acting, Sess. Judge, Kanara.

**Evidence Act, S. 133 — Confession—Confession by co-accused alone does not justify conviction—It must be corroborated by important independent evidence particularly about identity of accused.**

*Heaton, J.*, (*Scott, C. J.*, concurring) — The rule as to the use to be made of the confession of a co-accused is that a man ought not to be convicted solely on such confessions nor upon such confessions together with evidence of the ordinary kind which is trivial or unimportant. But where there is a body of evidence and circumstances enough to support a conviction if the evidence is accepted, such confessions may be taken into consideration together with the evidence and the circumstances [P 166 C 1]

*Shah, J.*—Before acting upon such confessions the Court should insist upon independent corroboration from other evidence in the case in material particulars, particularly as to the identity of the accused. [P 167 C 2]

The evidence, which is supposed to afford independent corroboration, must be in itself reliable and not doubtful evidence, which is treated as reliable in consequence of the confessions; otherwise it will not be independent corroboration. [P 167 C 2]

*Scott, C. J.*—Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime [P 172 C 1]

*S. S. Patkar*—for the Crown.

*S. V. Palekar*—for Accused.

**Heaton, J.**—Three men were tried for murder by the Sessions Judge of Kanara with assessors. He convicted two of them, accuseds 2 and 3, and acquitted Sabitkhan valad Bahadurkhan who is accused 1 in the case. The convicted accused appealed and their appeals were dismissed by this Court some time ago. The Government of Bombay have appealed against the acquittal of Sabitkhan and that is the appeal now before us. My learned brother and myself are unable to agree as to disposal of this appeal and therefore the matter will, as required by S. 429, Criminal P. C., have to be laid before another Judge of this Court.

In dealing with the appeal against the acquittal, we have to consider the evidence in the case and there are also confessions made by accuseds 2 and 3. On

the strength of that evidence and those confessions and also the decision of this Court in the appeals of accuseds 2. and 3, there is no doubt that those accused did take part in the murder of Mahammadkhan. If we assume that Mahammadkhan was murdered shortly after leaving his village of Alkerry on or about 25th September last, by accuseds 2 and 3 and possibly one or more others, and if we then believe all the circumstances deposed to by the witnesses, it follows as natural, though not perhaps as an inevitable inference, that Sabitkhan also took part in the murder. But for this we must believe all the incidents deposed to. These incidents are set out by the Sessions Judge as follows: "Now this Mahammad was a bachelor; but he had a younger brother, named Sabitkhan, who had a wife and family and was penniless. This Sabitkhan conceived himself to have a claim upon the generosity and good offices 'of his elder brother; and this claim he urged with importunity, both in season and out of season.

"Mahammadkhan did not take the same view of an elder brother's obligations. It was his opinion that Sabitkhan should earn his own living and he asked the Ranger to give the same advice. Many of the villagers have heard the brothers' quarrel. Last year the feast of Ganesh Chaturthi came to an end upon 24th September. It was at this feast that Mahammadkhan was last seen alive. The man was then in poor health. He intended to go to Calgutgie for a cure: and he invited one Bussia, Ex. 8, who was thought to be suffering from the same malady, to bear him company. Bussia was willing and he agreed to go. But that same evening Sabitkhan sought out this Bussia and dissuaded him from the undertaking. 'I myself will fetch you physic', said Sabitkhan: and Bussia, willing to be spared the labour of a long journey, renounced his project, and allowed Mahammadkhan to take the road alone. This Bussia saw Sabitkhan, who is accused 1, going next morning along the road which Mahammadkhan was to take and with him went the other two prisoners. Half an hour later he saw Mahammadkhan go the same way. Mahammadkhan was never seen alive again. It is a lonely road.

"Time went on, and Mahammadkhan did not return. He had been expected in a few days; but neither he came nor any word of him. But Sabitkhan opened his granary; and he was seen two, three or four times giving grain to his two fellows, accuseds 2 and 3. Juneu saw him do this (Ex. 9): and so did Day Munna. Now Day Munna had been asked by Mahammadkhan to keep an eye upon that grain: and accordingly he asked of Sabitkhan what he was doing with that rice. But Sabit bade him mind his own business (Ex. 10). When the time came for the tenants to pay their rents, Sabitkhan began to demand that these payments should be made to him. But the tenants had never been used to pay Mahammadkhan's rents to Sabit, and they had no mind to begin. They asked of Sabit by what authority he made these demands: and by-and bye there came for Sabit a letter, which was read for him by Anant Paund Pie. This letter purported to be an authority to Sabit to collect rents: but it was neither dated nor signed: and it was not in the handwriting of Mahammadkhan. Anant Paund Pie knows the writing of Mahammadkhan, and he had very grave doubts of that letter. He asked the Postmaster to examine the post mark, but the mark was indecipherable."

To accept all this is to put something of a strain on one's power of belief, for though there is no reason to suspect concoction of evidence in this case or to suppose that the witnesses are consciously untruthful, one must be reasonably cautious. No doubt the villagers of Alkerry came to suspect Sabitkhan and that suspicion would colour what they recollected of his doings. For this reason for example, the witness Bussia might in his recollections confuse the day Mahammadkhan was last seen alive with some other day on which he had seen three accused, or three men he came to believe were the three accused, go together into the forest. Similarly he might attribute too much importance to some innocent opposition by Sabitkhan to a suggestion that Bussia should accompany Mahammadkhan. Then recollection of the contents of a better is a notoriously uncertain thing: so far too much may be made by the Postmaster and Anant of the letter that came for Sabitkhan. Nevertheless the hypothetical jury we are so fond of appealing to, might convict Sabitkhan on this testimony. The Sessions Judge however would not; nor so far as I can Judge, would I myself. But accuseds 2 and 3 in their confessions both implicated Sabitkhan in the murder. Does that make any difference? As a matter of appreciation of evidence it certainly may do When I myself read these confessions, two of which were made before the committing Magistrate and two at an earlier stage, and compare and consider them and take them toge-

ther with the evidence. I arrive at a positive conviction that Sabitkhan did join in the murder. The two assessors in the case and also the Sessions Judge arrived at the same conclusion.

But the latter felt himself to be bound as a matter of law to acquit Sabitkhan because the conclusion that he was really guilty was based, to too great an extent on the confessions of the co-accused. For my own part I think he was wrong, though I quite see the force of the Sessions Judge's reasoning. To me it seems that the matter stands thus. The rule is that a man is not to be convicted solely on the confessions of co-accused persons; and it follows that he must not be convicted on such confessions together with evidence of the ordinary kind which is trivial or unimportant. For so to convict him would be in reality to disregard the rule. But in this case we have apart from the confessions, a body of evidence and circumstances enough to support a conviction, if the evidence is accepted as free from untruth or exaggeration or serious mistake or distortion. Therefore we are entitled to take the confessions into consideration and in doing so we must consider together the evidence, the circumstances and the confessions. We should not, it seems to me, divide the material into compartments and say the confessions of themselves are insufficient, the evidence is not altogether convincing and therefore we must acquit. It is not, as I look at it, a case of the weakest link in a chain.

Dealing with all the material before us the position to my mind is this: the hypothesis that Sabitkhan designed and joined in the murder explains everything. There is not a single circumstance apparent which it fails to explain. This hypothesis also is not confronted with any serious difficulties. It is not against the probabilities. The evidence and confessions do not bear the impress of falseness. Then there is no alternative hypothesis which so completely and convincingly explains matters. This cannot be a case of mistaken identity. It is not in my judgment a case in which malice has been at work and has fabricated or distorted the evidence. The only possible alternative hypothesis, so far as I can see, is that suspicion has caused the witnesses unconsciously to distort or exaggerate circumstances innocent in themselves; and that it is possible that the confessing co-accused have introduced the name of Sabitkhan in order to lighten their own responsibility. This hypothesis I find myself unable to regard as one for which any fair basis can be found in the known circumstances of the case.

Therefore I think the accused Sabitkhan should be convicted of murder. The appropriate sentence would be death, but when one Judge of this Court is not satisfied, though two Judges are satisfied of a man's guilt, the lesser sentence of transportation for life may, in my opinion, be properly imposed.

**Shah, J.**—This is an appeal by the Government of Bombay against the acquittal of Sabitkhan walad Bahadurkhan, who was accused 1 in the trial Court. He was tried along with two others by the Sessions Judge of Kanara with the aid of assessors on a charge of murder. The charge was that all the three accused murdered the deceased Mahammadkhan on or about 25th September 1917 at about 8 or 9 a. m. at Alkeri in the jungle.

The assessors were of opinion that all the accused were guilty. The learned Sessions Judge agreed with them as to accuseds 2 and 3 and accordingly convicted them and sentenced them to transportation for life. He however felt himself constrained to differ from them as to accused 1, whom he acquitted. The appeal by accuseds 2 and 3 to this Court against their convictions was summarily dismissed in August last.

The question in this appeal from acquittal is whether accused 1 is proved to be one of the murderers. The case for the prosecution is that the relations between the two brothers, accused 1 and the deceased Mahammadkhan, were considerably strained, and that with a view to secure the peoperty of Mahammadkhan accused 1 arranged to obtain the assistance of accuseds 2 and 3 and that all the three murdered him on the morning of 25th September 1917 while he was going alone on the way from Alkeri to Kirvatty. Mahammadkhan had no wife and no children. He owned lands in Alkeri and was a man of means. His brother accused 1 had a wife and children. He used to work as a coolie in the Forest Department not with regularity and he had no other means of livelihood. He

used to ask Mahammadkhan to help him; but the latter expected him to work and earn his livelihood and would not help him. On this account their relations were strained. They lived separately at Alkeri. Mahammadkhan did not return to the village, and some days after 25th September accused 1 commenced to meddle with the property of his brother, apparently made no inquiry about him, and gave unsatisfactory and evasive answers about his whereabouts. He received a letter some time in February in 1918, which was supposed to have been written to him by his brother. Ultimately on 31st March, the Range Forest Officer informed the Police Sub-Inspector who arrived on the scene on 1st April when he found accuseds 2 and 3 ready to point out the place where the dead body of Mahammakhan was buried and to confess. The Sub-Inspector wrote to the Magistrate and Mamlatdar of Yellapur, who arrived on 2nd April. Accuseds 2 and 3 pointed out the place where the dead body of Mahammadkhan was buried, and confessed that they and accused 1 had murdered him. All the accused were arrested on 2nd April. The confessions of accuseds 2 and 3 were recorded on 3rd April: and they adhered to the confessions in their statements before the committing Magistrate on the 26th April. They retracted their confessions and previous statements at the trial before the Sessions Court. The result of the trial is already stated. It is not disputed now, and it is indisputable, that Mahammadkhan was murdered; and it must be taken for the purpose of this appeal that accuseds 2 and 3 were concerned in the murder. The learned Sessions Judge reluctantly acquitted accused 1 as the evidence outside the confessions of the co-accused was weak as regards him, and as his conviction could not be based principally on the confessions of the co-accused.

On a consideration of the evidence in the case and the confessions of the co-accused, I am of opinion that the conviction of accused 1, if at all, must rest principally upon the confessions of the co-accused. I think such a conviction would be neither legal nor proper. I do not consider it necessary to discuss in this appeal the value of the confessions of the accused as a matter which may be taken into consideration against the co-accused under S. 30, Evidence Act. I have stated my opinion with reasons in *Emperor* v. *Gangapa Kardepa* (1) on that point. It will serve no useful purpose to repeat the same here. I only desire to state that the limitation laid down as to the use to be made of the confessions of the accused against a co-accused is not created by the High Courts, but is based upon what they hold to be the true meaning of the provisions of the Indian Evidence Act and, if I may respectfully add, upon sound sense. The rule, as I understand it, requires that before acting upon such confessions the Court should insist upon independent corroboration from other evidence in the case in material particulars, particularly as to the identity of the accused. If this rule be applied properly, personally I do not think that there would be any practical difference in the result whether the rule be accepted in the form in which I have stated it, or whether it is taken to be, as stated by Jenkins, C. J., in *Emperor* v. *Lalit Mohan Chuckerbutty* (2) that

"the Court can only treat a confession as lending assurance to other evidence against a co-accused.

But whether that is so or not, I am willing to take the rule in the form more favourable to the prosecution under the circumstances of this case, and to consider whether the other evidence in the case affords such independent corroboration. I also take it that there is no rule as to what would constitute sufficient independent corroboration in a particular case. That must depend upon the circumstances of that case. I desire to refer however to two considerations at the start: first, the evidence, which is supposed to afford independent corroboration, must be in itself reliable and not doubtful evidence, which is treated as reliable in consequence of the confessions; otherwise it will not be independent corroboration. Secondly, the value of the confessions of the accused against a co-accused, when those confessions are retracted at the trial, is very low, as pointed out in *Yasin* v. *King-Emperor* (3) and in *Lalit Mohan's* case (2) at p. 588 (*of I. L. R. 38 Cal.*) of the report. I shall now deal with the evidence. It is urged for the Crown that

(1) A. I. R. 1914 Bom. 305 = 38 Bom. 155 = 21 I. C. 673.
(2) [1911] 38 Cal. 559 = 10 I. C. 582.
(3) [1901] 28 Cal. 639.

the following circumstances afford independent and sufficient corroboration of the confessions of the co-accused in this case:

(1) that accused 1 dissuaded the witness Bussia from accompanying the deceased on the morning of 25th September though the witness had agreed in the first instance to go with the deceased to Devikop for treatment; (2) that accused 1 was seen going with accuseds 2 and 3 that morning on the same path iollowed by the deceased a short time after; (3) that the accused was on terms of enmity with his brother and in need of money and had a motive in getting rid of his brother; and (4) that his subsequent conduct in dealing with the property of the deceased, in failing to make any inquiry about him, in giving evasive and unsatisfactory replies and in receiving a letter, which must have been a forged letter, purporting to have been written by his brother. indicates a guilty knowledge of his brother's murder.

As regards the first two circumstances, they depend entirely upon the evidence of Bussia. His evidence is important. The learned Sessions Judge did not consider it safe to rely upon this evidence. I consider it unsafe to rely upon his testimony for the following reasons:— In the first place he is speaking of incidents which took place nearly six months before he first mentioned these matters to any one and the incidents in themselves are so ordinary that he would not be expected to remember them. Secondly, he does not appear to me to be a witness who can be credited with anything like clear and reliable memory; he mentions his age as eight or nine when he is probably 25 years old. Thirdly, it does not appear from the record as to when and how this evidence came to be known to the investigating officer for the first time, which is a matter of importance under the circumstances. Lastly, he does not appear to have asked accused 1 for the cure which he is said to have promised to procure for him at the time of dissuading him, nor does he appear to have shown any concern for a long time after the disappearance of Mahammadkhan even though, if his evidence were true, he would be clearly interested in knowing whether the treatment which he at one time wanted to have, had done Mahammadkhan any good. I must therefore hold that the first two circumstances relied upon as affording an independent corroboration to the confessions are not proved.

The other circumstances relating to motive and conduct generally speaking are proved. There is reliable evidence that the relations of the two brothers were strained and that accused 1 was in needy circumstances. As regards the subsequent conduct, though I regard the details with some suspicion, broadly speaking, the conduct attributed to him is proved. But it is easy to overrate its importance. It is the conduct of a callous and indifferent brother but not necessarily the conduct of a murderous brother. As to the letter, his conduct would be much the same if any enemy had sent him a letter of that kind or if any person interested in tracing the whereabouts of Mahammadkhan had written to him with a view to see what use he would make of the letter. Apparently he did not use the letter in any way. I am not satisfied that the circumstances justify our treating the accused to be a man of such intelligence as to be able to resort to a plan which requires so much forethought and cleverness. I have not thought it necessary to discuss the evidence on this point in detail, as taking it at its best I am satisfied that the evidence as to motive and conduct affords neither independent nor sufficient corroboration to the confessions. It is independent in the sense that it is proved by evidence outside the confessions but the facts connected with the motive and conduct generally would be known in the village and to the people at Kiravatty who knew the two brothers: and if any one was interested in getting accuseds 2 and 3 to mention the name of accused 1 falsely or if for any reason accuseds 2 and 3 were inclined to mention his name falsely, this knowledge is just the thing which would render the inculpation of accused 1 easy.

It would be plausible and apparently credible to state that accused 1 was concerned in the murder. Accuseds 2 and 3 knew Mahammadkhan well and as they were the murderers, they would know the whole story generally: and under the circumstances the inculpation of accused 1, even if incorrect, would be easy. It is because a false inculpation is easy, that the need for closely examining the nature

of circumstances affording independent corroboration is great. It is obvious that it would be insisting upon no independent corroboration to treat matters of such common knowledge among the persons concerned as affording that kind of corroboration. In the present case the evidence as to the investigation is rather meagre or at any rate not full. We do not know as to how and when accuseds 2 and 3 were found ready to confess. Apparently accuseds 2 and 3 were found by the Sub-Inspector ready to give out the whole story. The Range Forest Officer says that he first heard the rumour that accuseds 1 and 2 and another had murdered Mahammadkhan on the 30th March. Thus we do not know when and to whom accuseds 2 and 3 first mentioned the name of accused 1, and as to who gave the information to the Range Forest Officer that accuseds, 1 and 2 and another were the murderers. Thus the circumstances under which the name of accused 1 came to be mentioned by accuseds 2 and 3 are left in obscurity. It would be very unsafe to treat the facts proved as to motive and conduct as an independent corroboration. Even treating it as affording some corroboration, I do not think it is sufficient under the circumstances. It is true that the proved circumstances in the case are consistent with the guilt of accused 1; they may create a certain amount of suspicion against accused 1; but do not prove anything as to his participation in the crime. It may be that accused 1 was concerned in the murder, but that is obviously insufficient. I have to consider whether it is proved that he was so concerned. I am of opinion that the confessions of the co-accused are not sufficiently corroborated by independent evidence and the conviction of accused 1 must therefore rest, if at all, principally upon the confessions of the co-accused. I am clear that such a conviction would not be legal, and that in any event it would not be proper. I doubt whether the assessors could realise the limitation, subject to which the confessions could be used against co-accused; and it does not appear whether the learned Sessions Judge had explained the point to them. I am therefore unable to attach that weight to their opinion which I would do in an ordinary case.

The learned Sessions Judge has rightly apprehended the rule as to the value of the confessions of the accused against a co-accused and has fairly applied it in appreciating the evidence. I am not concerned with his other observations which do not touch the conclusion in any way, but which may have a bearing upon the question whether the rule, which he felt himself bound to follow, ought to exist or not. There is only one point to which I may properly refer. While speaking of an appeal against acquittal, the learned Sessions Judge has referred to the possibility of this Court ordering a re-trial in order that accuseds 2 and 3 may be examined as witnesses now. The learned Government pleader has not asked for a re-trial. In my opinion there is no reason whatever to order a re trial. The trial was valid and proper. It was open to the Crown, if so minded, to have secured the examination of accuseds 2 and 3 as witnesses by asking for the separate trial of accused 1 at the proper time. The joint trial was not objected to: and the trial Court apparently did not think that in the interests of justice a separate trial was necessary. I would therefore dismiss the appeal.

**Scott, C. J.**—The case against the accused is that in concert with Honya and Umya he murdered his brother Mahammadkhan on or about 25th September 1917 about 8 or 9 in the morning in the forest near Alkeri in Kanara. Honya and Umya were tried jointly with the accused by the Sessions Judge of Kanara and two assessors. Honya and Umya were found guilty upon their own confessions, but the accused Sabitkhan was acquitted, and the Goxernment of Bombay have appealed against his acquittal.

The evidence before me is that which was recorded by the Sessions Judge at the joint trial. It establishes that Mahammadkhan was the owner of the most of the land and houses, only eight or nine in number, in the village Alkeri which is situated less than a mile and a half from Kirwatty, Kirwatty being on the main road from Yellapur to Kalgutgy, and about 12 miles from the latter place. The relations between Sabitkhan and Mahammadkhan the deceased were very strained. Mahaminadkhan had neither wife nor children, and was not disposed to support his brother Sabit and his family. Sabit consequently was obliged to work as a coolie in the Forest Department, and was

continually importuning the deceased for assistance which was continually refused, and although the two brothers lived in the same building they did not associate and all their intercourse was unfriendly. On or about 24th of September 1917, the deceased who was suffering from pains in his stomach decided to go to Kalgutgy for treatment and requested a neighbour named Bussia in the presence of another inhabitant of Alkeri named Day Munna to accompany him, as Bussia was also suffering from pains in the stomach. On the 25th September the deceased left Alkeri in the morning alone. At all events, he was never seen after that time at Alkeri. He had left a bin of rice in front of his house upon which he had asked a neighbour Day Munna to keep an eye, saying he would be back in a few days. About a fortnight after his departure the accused began to make free with the grain. When Day Munna asked him what he was doing with the rice, Sabit asked what business it was of his.

According to witness Juncu, Sabit said when asked that Mahammadkhan would not be back soon and on several occasions gave rice from the bin to Honya and Umya, the convicts at the first trial. Three months after the Ganesh Chaturthi, the accused told Boojang, a shopkeeper of Kirwatty, that Mahammadkhan had gone for medical treatment to Miraj. He began after the crops had been got in to ask the tenants of Mahammadkhan to pay their rents to him. Four months after the departure of Mahammadkhan, namely, on 4th February 1918, the Ranger of the forest, having heard that Sabit was trying to collect the rents of Mahammadkhan, sent for him and asked him if he had heard from Mahammadkhan and what had become of him. He replied that Mahammadkhan had gone to Miraj and that no letter had come. Later in February at Kirwatty when Postmaster Wycunt delivered him a letter in the presence of Anant, a shopkeeper, Sabit tore it open and asked Anant to read it to him. Both Anant and Wycunt depose to the contents of the letter. Their versions are not verbally identical, but are to the same effect. The letter which was unsigned and undated purported to come from Mahammadkhan from Belgaum, and stated that he was getting better and proposed to go to Miraj. It directed Sabit to collect the rents and pay the assessment and said that if Mahammadkhan wanted money he would let Sabit know. The letter was returned to Sabit.

Three of the witnesses who lived at Alkeri deposed to Sabit demanding rent from them and stating that he had a letter from Mahammadkhan. At the end of March the convicts Honya and Umya disclosed a spot in the forest between Alkeri and Kirwatty in which the remains of Mahammadkhan were buried. It was found that his ribs had been broken. Bussia of Alkeri, who has already been mentioned in connexion with Mahammadkhan's proposed journey to Kalgutgy, stated that he had been persuaded by Sabit not to go with Mahammadkhan, and that on the day following, i. e. the 25th September, he had, while driving cattle towards Kirwatty near the village Tank, seen Sabit together with the two other accused taking the path from Alkeri to Kirwatty, and half an hour later had seen Mahammadkhan take the same path. The muster roll kept by the Forest Officer shows that Sabit was absent from his work on 25th and following days of September. The learned Judge says he has no reason to disbelieve Bussia, but he doubts if Bussia could remember exactly the day on which he saw Sabit and the two convicts go along that path because there was no impressive concomitant circumstance. There is no doubt that Mahammadkhan never went to Belgaum and never reached Kalgutgy and that the letter opened by Sabit in Kirwatty is a false document which might explain the absence of Mahammadkhan and justifiy Sabit's attempts to collect his rents. If there were no other evidence in the case, and if the evidence of Bussia were discarded, it seems to me there would still be a strong case of suspicion against Sabit as being concerned in the murder of Mahammadkhan.

The Sessions Judge, however had before him not merely this evidence, but also the detailed confessions of Honya and Umya (who had reasons for disliking Mahammadkhan), who state that Sabit participated with them in the murder of Mahammadkhan and engaged their services on a promise of payment in grain, and that the body was buried with a spade provided by Sabit, the spade which was found in Sabit's house after the confession. These confessions must be taken

into consideration against Sabit according to the provisions of S. 30, Evidence Act. But the learned Judge seems to have been afflicted by a certain paralysis of his judicial faculty owing to a pernsal of reported cases which lay down that a man should not be convicted upon the uncorroborated confession of his co-accused, and reading these cases in conjunction with an observation occurring in the judgment of the Calcutta High Court in the case of *Emperor* v. *Lalit Mohan Chuckerbutty* (2), to the effect that

"the Court can only treat a confession as lending assurance to the other evidence against a co-accused,"

he considers himself unable to make use of the confessions at all, because there is not a perfect enough case against the accused without them, although as he states he has no doubt whatever that the accused committed the murder. He puts it thus:

"It is not enough that the other evidence should support the confessions. It is the confessions which must support the other evidence, which 'must afford a basis broad enough and firm enough to sustain a conviction if the superstructure be steadied by some adventitious and subsidiary prop,' such as the confessions."

The learned Judge in the above quotation from *Lalit Mohan's* case (2) has omitted the concluding words:

"Thus to illustrate my meaning, in the view I take, a conviction on the confession of a co-accused alone would be bad in law."

The rule which the learned Judge conceives to be binding on him is affirmed by Jackson, J., in *Queen* v. *Chunder Bhuttacharjee* (4) in this form,

"that, when, as against any such person, there is evidence tending to his conviction, the truth or completeness of this evidence being the matter in question, the circumstance of such person being implicated by the confession of one of those who are being jointly tried with him should be taken into consideration as bearing upon the truth or sufficiency of such evidence."

It is also affirmed in the judgments of Jackson and McDonell, JJ., only out of the Full Bench of five Judges in *Empress* v. *Ashootosh Chuckerbutty* (5), where the third question referred was:

"Whether such a confession made by one such person may be used as the basis of proof of the offence charged as against the other, and if corroborated, may sustain a conviction: or whether it is necessary, in order to sustain a conviction, to use such confession only as itself corroborative of other independent evidence."

The answer of the Chief Justice to this question was:

"If the confession is corroborated by other evidence, I do not think it matters whether, in proving the case at the trial, the confession precedes the other evidence, or the other evidence precedes the confession. The course of proof in each case is a question of convenience for the prosecution; and they have a right to bring forward the evidence in any order they may think fit."

This question has not, so far as I am aware, been considered in any Bombay case. The passage from the judgment in *Lalit Mohan's* case (2) is only quoted by Shah, J., in *Emperor* v. *Gangapa Kardepa* (1) in support of the conclusion that no matter which can be taken into consideration only under S. 30, if there is no evidence other than such matter, can form the basis of a legal conviction. I propose to take the judgment of Garth, C. J., in *Empress* v. *Ashootosh Chuckerbutty* (5) as a correct statement of the law: it gives effect without qualification to the words of S. 30 that

"the Court may take into consideration such confession as against such other person as well as against the person who makes such confession."

The question here is not as in *Emperor* v. *Gangapa Kardepa* (1), whether the Court may convict solely on the confession of a co-accused. The Sessions Judge has not done so, nor have either of the High Court Judges whose difference has led to this reference. The question is rather one of appreciation of evidence. I have to consider whether on the facts established there is corroboration of the story of the confessing co accused so far as it affects Sabit. I will only make this further remark with regard to *Emperor* v. *Gangapa Kardepa* (1) that I think Macleod, J., went too far when he said in that case (p. 176 *of I. L. R.* 38 *Bom.*)

"The confession of a co accused stands on quite a different footing to the testimony of an accomplice, which the Evidence Act treats as having a higher probative value than similar evidence has according to English Law."

I think it will be apparent to any one who peruses the judgment of Lord Reading, L. C. J., in *Rex* v. *Baskerville* (6), that except in regard to corroboration of an accomplice by accomplice evidence there is no difference between the law in England and the law in India.

As regards the confessions of co-accused the Indian law has no counterpart in England but it seems to me that for the purpose of admissibility such confessions stand on the same footing as accomplice

(4) [1876] 24 W. R. Cr. 42.
(5) [1879] 4 Cal. 483 (F. B.).
(6) [1917] 86 L. J. K. B. 23.

evidence and that their weight must depend on the circumstances of each case. I propose therefore to apply to the question of corroboration of the confessions the same rules as are applicable to the corroboration of accomplice evidence. In *Rex* v. *Baskerville* (6), a criminal appeal heard by a Court of five Judges specially constituted to lay down rules for future guidance, it was said

"there are propositions of law applicable to corroboration which are beyond controversy. For example 'confirmation does not mean that there should be independent evidence of that which the accomplice relates or his testimony would be unnecessary' *Reg* v. *Mullins* (7). Indeed if it were required that the accomplice should be confirmed in every detail of the crime his evidence would not be essential to the case it would be merely confirmatory of other and independent testimony."

In the same case it was held that

"evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him—that is which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it." "The corroboration need not be direct evidence that the accused committed the crime: it is sufficient if it is merely circumstantial evidence of his connexion with the crime. A good instance of this indirect evidence being *Reg* v. *Birkett* (8)."

A good Indian illustration of circumstantial evidence corroborative of the confessions of coaccused is to be found in the judgnt of Phear, J., in the *Queen* v. *Naga* (9). Does then the testimony independent of the confessions affect the accused by connecting or tending to connect him with the crime? I start with the fact that Mahammadkhan was murdered and buried in the forest within a mile of his house. Evidence that when that man has been murdered and buried within a mile of his house his brother and his enemy seeking to profit by his disappearance tells a false story as to his whereabouts affirming him to have gone to Miraj a town distant 100 miles or more for medical treatment tends to connect the brother with the crime. So does evidence that the brother with has been seen on several occasions giving grain to the confessed murderers to whom he had no ostensible reasen to be charitable. So does evidence that when trying to collect rents due to the murdered man he calls the tenants and tells them a false story that he has received a letter of authority from his brother.

No Judge who has considered the evidence has expressed a doubt as to the credibility of the witnesses who depose to these events. But the trial Judge and Shah, J., are not satisfied that Bussia can remember the day when he saw Mahammadkhan leave preceded by Sabit, Honya and Unya. Shah, J., also appears to have doubted the story of the letter received in Kirwatty. I do not share these doubts, for the date of Mahammadkhan's departure from his village on the day after the Vansha would be known to all the residents, and I see no reason to doubt the truth of the story told by Wycunt and Anant about the letter: it is entirely consistent with the other evidence of the false story spread by Sabit that his brother had gone to Miraj for treatment although we do not know by what agency Sabit got the letter written and sent to Kirwatty. I concur in the conclusion arrived at by Heaton, J. I find the accused guilty of the murder of Mahammadkhan and sentence him to transportation for life.

G.P./R K. *Appeal allowed.*

(7) [1848] 3 Cox. C. C. 526.
(8) [1839] 8 Car. & P. 732.
(9) [1875] 23 W. R. Cr. 24.

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## A. I. R. 1919 Bombay 172

HEATON AND SHAH, JJ.

*Byramji Pudumji* — Accused—Applicant.

v.

*Emperor*—Opposite Party.

Criminal Revn. Appln. No. 38 of 1919 Decided on 3rd April 1919, against conviction and sentence passed by Dist. Magt. Poona.

**Cantonment Code (1912), R. 97—Scope—Option to determine question whether building is dangerous is with authority and not owner.**

The option given by R. 97 of the Cantonment Code of deciding when any building is in a ruinous condition or in any way dangerous to the occupier, whether the owner shall be required to remove the same or be required to cause repairs to be made, is an option given to the Cantonment authority and not to the owner of the building.

[P 173 C 1, 2]

*Velinkar*, *Payne & Co* and *P. Bunter*—for Applicant.

*S. S. Patkar*—for the Crown.

**Heaton, J.**—The only point as to which it is necessary for us to express an opinion is the meaning of R. 97, Canton-

ment Code of 1912. R. 97, runs as follows:

"Where any building, wall or structure or anything affixed thereto or any bank or tree, is in the opinion of the Cantonment authority, in a ruinous state or in any way dangerous either in the case of an occupied building, to the occupier or to the public the Cantonment authority may by notice in writing require the owner or occupier thereof forthwith either to remove the same or to cause such repairs to be made as it may think necessary for the safety of the occupier or of the public, etc."

The point arises in this way: The Cantonment authority sent a notice under this section to the applicant to remove a building, and the applicant says that the notice was not a legal notice because under the section it had to be a notice to him he argues, either to remove or to cause repairs to be made. So we have to choose between two alternative meanings of these words. Do the words describe the notice and must the notice always be in the alternative either to remove or to repair the choice lying with the owner; or do the words describe a power given to the Cantonment authority: who may choose whether the notice shall be to remove or shall be to make repairs? I hold that the latter is the true interpretation. I do so because firstly, I think that the words themselves apart altogether from any extraneous considerations mean this. And secondly if we take extraneous matter into account they seem to me to lead to the same conclusion. I gather that the meaning of the framers of this Code was to give the choice not to the owner but to the Cantonment authority. If the framers of the Code had in view the interests of the public the requirements of safety and of sanitation it seems to me that it inevitably follows that the intention was to give the power to the Cantonment authority and not to leave the choice to the owner of the property. I think therefore that the Magistrate's order was correct and that the rule should be discharged.

**Shah, J.**—I agree. I desire to add that at one stage of the argument I was impressed with the contention urged by Mr. Velinkar that under the rule an option of removing the building or of effecting the repairs which may be specified by the Cantonment authority should be given in every notice to the owner. But on a further consideration, I feel satisfied that the argument is more plausible than sound and that the words of the section convey the meaning that the option is given to the Cantonment authority of deciding, when any building is in a ruinous state or in any way dangerous to the occupier, whether the owner shall be required to remove the same or whether he shall be required to cause such repairs as may be necessary for the safety of the occupier or the public. It is also clear that if due regard is had to the object and the scope of this rule that is the interpretation which ought to be accepted. I am unable to see any force in the suggestion made on behalf of the accused that if it were intended that the option was not to be given to the owner in every notice given under this rule, the expression:

"require the owner or occupier thereof forthwith either to remove the same or to cause such repairs to be made as it may think necessary for the safety of the occupier."

would not be appropriate. I think that if the framers of the Code intended to give to the Cantonment authority the power of deciding whether under certain circumstances the building should be removed or whether it should be repaired in a particular manner the expression used would be appropriate.

G.P./R.K. *Rule discharged.*

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## A. I. R. 1919 Bombay 173

MACLEOD AND PRATT, JJ.

*Emperor*

v.

*Dhondya* bin *Dudya*—Accused.

Criminal Ref. No. 18 of 1919, Decided on 7th May 1919, made by Dist. Magistrate, Belgaum.

**(a) Railways Act (9 of 1890), Ss. 126 and 130—Offence under S. 130 read with S. 126 can be summarily tried by Magistrate.**

When a person is prosecuted under S. 130, read with S. 126 (a) the offence is not one triable exclusively by a Court of Session; a Magistrate has jurisdiction to try it, and to try it summarily. [P 174 C 1]

**(b) Railways Act (9 of 1890), Ss 126 and 130—Exemption to minor under Ss. 82 and 83, Penal Code, is not applicable in offence under S. 130 though it is under Ss. 126 to 129—Penal Code (1860), Ss. 82 and 83.**

Section 130, Railways Act, enacts an offence distinct from the offences in Ss. 126 to 129 of the Act. A minor who is entitled to the benefit of S. 82 or S. 83, I. P. C., does not commit an offence when he is guilty of any of the acts or omissions referred to in Ss. 126 to 129, Railways Act. It is S. 130 of the latter Act which, by excluding the operation of these exceptions, creates the offence. [P 174 C 1]

**Judgment.**—This is a report by the District Magistrate of Belgaum, under

S. 438, Criminal Procedure Code, of the case of the accused Dhondya bin Dudya, a boy aged nine years, who has been convicted by the Cantonment Magistrate of Belgaum after a summary trial of an offence under S. 130, Railways Act of 1890.

The District Magistrate considers that as the act which the boy committed, viz. putting a nail on a railway line, amounted to an offence under S. 126 (a), Railways Act, the case was triable only by a Court of Session. We think it clear that S. 130 enacts an offence distinct from the offences in Ss. 126 to 129. A minor who is entitled to the benefit of S. 82 or S. 83, I. P. C., does not commit an offence when he is guilty of any of the acts of omissions referred to in Ss. 126 to 129. It is S. 130 which, by excluding the operation of these exceptions, creates the offence. No doubt if the accused has been charged with an offence under S. 126 (a) the Magistrate should have committed the case to the Court of Session and left the accused to establish his defence under S. 83, I. P. C. But the accused was not prosecuted under S. 126 (a). The summary register shows that he was prosecuted, under S. 130 read with S. 126 (a), Railways Act. The prosecution therefore conceded that though the accused had committed the act described in S. 126 (a), he had not attained sufficient maturity of understanding to judge the nature and consequences of his conduct and elected to proceed under S. 130. The offence with which the accused was charged was therefore under S. 130, and this offence the Magistrate had jurisdiction to try Sch. 2, Criminal P. C. and to try summarily, S. 260, Criminal P. C. There is therefore no occasion for our interference and we direct the record and proceedings to be returned to the Magistrate.

G.P./R.K. *Order acordingly.*

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## A. I. R. 1919 Bombay 174

HEATON AND HAYWARD, JJ.

*Vithal Bhimrao Kulkarni*, Applicant, *In re.*

Criminal Appln. for Revn. No. 213 of 1918, Decided on 15th October 1918, from order of Magistrate, First Class, Bijapur.

**Crminal P. C. (1898), S. 195—Decree-holder obtaining sanction to prosecute judgment-debtor's witness for perjury—Decree transferred before prosecuton — Transferee is entitled to prosecute.**

Where a decree-holder obtained sanction to prosecute one of the judgment-debtor's witnesses for perjury but before starting the prosecution transferred the decree to another:

*Held*: that the transferee of the decree was entitled to prosecute the witness under the sanction obtained by the decree-holder. [P 175 C 1]

*H. B. Gumaste*—for Applicant.

*K. H. Kelkar*—for Opponent.

**Hayward, J.**—A man called Shidappa sued a man called Annaji and another for debt. Annaji pleaded part payment and the man called Vithal swore to it. Shidappa got a decree in which it was held there was no part payment. He also obtained sanction to prosecute the man Vithal for perjury, which was granted by the Subordinate Judge. Shidappa then transferred his decree to one Tammaji, who proceeded to prosecute Vithal for perjury before the First Class Magistrate. Vithal has objected to this prosecution on two grounds. The first ground is that there was no document of sanction beyond the order itself passed by the Subordinate Judge, and it was urged that a separate formal document was necessary as described in the case of *Queen-Empress* v. *Rachappa* (1). But it does not seem to me that it was ever intended in that case to lay down that a prosecution would be illegal in default of any such formal document and resting merely upon the actual order of the Subordinate Judge. There is no such express requirement in the law. All that is required is that there should be a sanction of the Subordinate Judge under S. 195, Criminal P. C.. But the matter in any case is, in my opinion, of no substantial importance as the irregularity, if any, would have been covered by S. 537, Criminal P. C.,

The second objection has been that the sanction was granted to Shidappa and was not granted to Tammaji and that therefore, the prosecution should not proceed. There [illegible] it is true, certain

(1) [1889] 13 Bom. [illegible].

remarks, as to the necessity of formal transfer by the grantee of such sanction in order to make it proper to proceed with the prosecution, in the cases of *Jogendra Nath Mookerjee* v. *Sarat Chandra Banerjee* (2) and *Kali Kinkar Sett* v. *Nritya Gopal Roy* (3), but it seems to me that the remarks there were intended really to refer to the proper exercise of the discretion of the sanctioning authority.. If they were intended to lay down anything more than that, then it would be my duty to record my respectful dissent, for there is no specific provision requiring that the prosecutor should be specified in S. 195, Criminal P. C., It seems to me that in all these cases the substantial question is not whether a particular person ought to be allowed to prosecute, as indicated in *In re Thathayya* (4) and *In re Mowjee Liladar* (5), but whether the bar against the prosecution of the particular person charged with having broken the law ought to be removed. In this case no particular reason has been shown why the alleged law-breaker, Vithal should not be prosecuted for having, as alleged, perjured himself in the Court of the Subordinate Judge. It seems to me, therefore that this application ought to be rejected, no sufficient reason having been shown why the prosecution of Vithal should be prevented by this Court.

**Heaton, J.** — I concur.

We know that this man Vithal ought to be prosecuted because the Subordinate Judge made an order to that effect. A certified copy of this order was obtained by Tammaji, who presented a complaint to the Magistrate. Thereupon no doubt the Magistrate was empowered to consider, and could rightly consider, whether he would accept the complaint at the hands of Tammaji. The Magistrate has considered this and he has accepted the complaint at the hands of Tammaji and I do not think in the circumstances there is any occasion for us to interfere.

G.P./R.K. *Rule discharged.*

(2) [1905] 32 Cal. 351.
(3) [1905] 32 Cal. 469.
(4) [1889] 12 Mad. 47 = 2 Weir 164.
(5) [1906] 8 Bom. L. R. 32.

## A. I. R. 1919 Bombay 175

HEATON AND HAYWARD, JJ.

*Shivbai Babya Swami*—Defendant—Appellant.

v.

*Yeshu Cheoo Nayakin*—Plaintiff—Respondent.

Second Appeal No. 115 of 1917, Decided on 23rd July 1918, against decision of Dist. Judge, Ratnagiri, in Appeal No. 424 of 1915.

**Civil P. C. (1908), Ss. 47, 144 and 151—Ex parte decree set aside—Sale in execution of decree can be set aside—Application to set aside sale is governed by Art 181 and time runs from date on which ex parte decree is set aside—Limitation Act (1908), Art. 181.**

Plaintiff obtained an ex parte decree against the defendant and caused the latter's house to be sold in execution and purchased it himself. The defendant subsequently got the ex parte decree set aside, but on a retrial of the case a decree was again passed against him. He then applied to have the previous sale of the house set aside:

*Held*: (1) that the ex parte decree having been set aside, the sale which was held in execution of that decree ought itself to be set aside as being no longer based on any solid foundation; (2) that the application to set aside the sale could be treated as one under S. 47, or S. 144 or S. 151; (3) that the application was governed by Art. 181, Sch. 1, Lim. Act, and that limitation began to run from the date on which the ex parte decree was set aside. [P 176 C 1,2]

*Nilkanth Atmaram*—for Appellant.

*P. B. Shingne*—for Respondent.

**Hayward, J.**—The plaintiff Yesu got an ex parte decree for Rs. 86 against the defendant Shivbai in 1906. Shivbai's house was sold in execution of that decree in 1910, but she succeeded in subsequently getting the ex parte decree set aside and in having the case retried. The plaintiff Yesu succeeded in the retrial in obtaining a decree against the defendant Shivbai for a sum of Rs. 87 in 1914. But Shivbai then applied to have the previous sale of the house in execution set aside. That application was granted by the Court of first instance, but was rejected by the Court of first appeal, which appears to have treated the application as one under S. 47, Civil P. C. Shivbai has accordingly come to get that decision set aside in second appeal.

The substantial point argued has been whether in the circumstances stated the previous sale of the house in execution could be set aside, and reliance has been placed for the finding on the negative upon the case of *Shivlal* v. *Shambhuprasad* (1).

(1) [1905] 29 Bom. 435.

But it has been replied to that argument that that case referred particularly to the equities arising in favour of a third party being a bona fide purchaser for value without notice at the court sale. It seems to me that there is force in this argument, particularly in view of the remarks of the Privy Council in the case of *Zainulabdin Khan* v. *Muhammad Asgar Ali Khan* (2), in which their Lordships of the Privy Council pointed out at p. 172 that

"there is a great distinction between the decree-holders who came in and purchased under their own decree, which was afterwards reversed on appeal, and the bona fide purchasers who came in and brought at the sale in execution of the decree to which they were no parties, and at a time when that decree was a valid decree, and when the order for the sale was a valid order."

That distinction has recently been again referred to in the case of *Set Umedmal* v. *Srinath Ray* (3). It seems to me therefore upon the equities and upon the authorities that the previous sale of the house in execution under the previous decree which had been set aside ought itself to be set aside, as being no longer based on any solid foundation.

There was also some argument as to the particular rule under which such an order could be made. It seems to me that the order must be held to be made, as decided without subsequent objection by the first appeal Court, under S. 47, Civil P. C., and if any further authority for such an order should be required then it seems to me that a reference could be made either to S. 144 or S. 151, Civil P. C. It has been urged that the former section does not cover a case in which an ex parte decree has been set aside. But it seems to me that the words used are sufficiently wide to cover even such a case, though the use of the word "varied" or "reversed" and the reference to 'the Court of first instance' would appear on first sight to have had primarily in view proceedings in appeal. But however that may be, the case would, in my opinion, undoubtedly be covered by S. 151, Civil P. C. There can, in my opinion, be no real doubt in such a case as to there being a second appeal, because the proceedings were, as already stated, under S. 47 to which it has merely become necessary by reference to apply the provisions of S. 144 or S 151, Civil P. C. It was also suggested that the application ought to be regarded as time-barred under Art. 166 of the Schedule to the Limitation Act : But that article appears to be haraly applicable to the facts of this particular case. The cause of action accrued upon setting aside the ex parte decree in 1914 and taking that as the date from which limitation ran, the application would clearly be within time under the provisions of Art. 181 of the Schedule to the Limitation Act. We ought therefore in my opinion, to set aside the order of the first appeal Court and to direct that the previous sale of the house in execution should be set aside, but subject in all the circumstances to this condition that Shivbai pays up the amount now due from her under the second decree within three months of the decision of this second appeal. Each party to bear his own costs throughout.

**Heaton, J.**—I have very little to add to the judgment just delivered. I would however add this. We have here a case of a wrong which has been done to the applicant, because her property was sold under an ex parte decree wrongly obtained. She was ignorant of the decree and even of the sale which thereafter took place under it and therefore was unable within the period allowed by limitation to get the sale set aside by the ordinary application, which must be made within one month. And if she is to get it set aside at all, it can only be either by suit or by an application of another kind. It has been decided by the District Court, and against this decision there was no appeal, that this application should be treated as one under S. 47. We are therefore only concerned with the question whether the Court has the power to set aside the sale. That question my learned brother has dealt with and I agree to the order proposed.

G.P./R.K. *Order set aside.*

(2) [1888] 10 All. 166=15 I. A. 12=5 Sar. 129 (P. C.).
(3) [1900] 27 Cal. 810.